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91-1537

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICARDO GARZA, JUANITA R. GARZA,
AND ISHMAEL SOSA,
Petitioner,
v.
UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether a conviction is valid when based upon a verdict which jurors swore they had never unanimously reached, as to which the Courts of Appeals and state courts of last resort are in conflict.

Whether evidence of an offense for which the Petitioner Ricki Garza has been acquitted may be used in the same preceding to prove a predicate offense under RICO (18 U.S.C. §1962(c)) in violation of the collateral estoppel doctrine of the double jeopardy clause and the double jeopardy clause of the fifth amendment to the United States Constitution.

LIST OF PARTIES

All parties are listed in the caption on the cover hereto. Supreme Court Rule 14.1(b)

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation." U.S. Const., Fifth Amendment [emphasis supplied].

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public *trial, by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const., Sixth Amendment [emphasis supplied].

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; *-to Controversies to which the United States shall be a Party;* -To Controversies between two or more States; -between a State and Citizens of another State; -between Citizens of different States; -between Citizens of the same State claiming Lands under Grants of

different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. art. III, § 2 [clause 3 emphasized].

"It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c).

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance" 21 U.S.C. §841(a)(1).

"Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." Fed. R. Evid. 606(b).

"The verdict shall be unanimous. It shall be returned by the jury to the judge in open court." Fed. R. Crim. P. 31(a).

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PETITION FOR CERTIORARI

REFERENCE TO OPINIONS

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) is reported in 942 F.2d 903 (5th Cir. 1991). The opinion of the District Court below (Appendix B, *infra*, p. 31a) was not reported.

JURISDICTION

The judgment of the Court below (Appendix A, *infra*, p. 1a) was entered on September 13, 1991. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order (Appendix C, *infra*, p. 43a) denying the petition on November 25, 1991. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code [28 U.S.C. §1254(1)] and Supreme Court Rule 10.1.

STATEMENT OF THE CASE

The petitioners were charged by indictment with conspiracy and engaging in a continuing criminal enterprise, conspiracy and conducting an enterprise's affairs through a pattern of racketeering activity, possession with intent to distribute a controlled substance, use of a communication facility in the commission of a felony, and money laundering in violation of 21 U.S.C. §841(a)(1), 18 U.S.C. §1962(c) and 18 U.S.C. §1956. Petitioner plead not guilty.

The morning of jury selection, July 11, 1989, and in front of the jury venire the Trial Court inquired how many persons did not appear for jury service and summarily assessed those persons three days in jail and a fine and ordered the marshal to "take them into custody and bring them forth." [R. 74, 11.12-19, vol.2] Thereafter a jury was selected from that venire and trial begun.

On July 24, 1989, the Government rested its case and moved to dismiss counts 7,4,27,29, and 5 and the Trial Court dismissed these counts of the indictment [R.2226, 11.19-R.2228, 11.1-7, vol. 18]; the Trial Court found insufficient evidence to support a conviction as to count 21

and 42 and dismissed those at the close of the Government's cases' [R.2228, 11.8-19, vol. 18]; petitioners' Motions for Judgment of Acquittal on the remaining counts were orally presented and denied [R.2231, 11.4-12, vol. 18].

On July 28, 1989 at 11:45 a.m. the jury sent a note to the Trial Judge asking what would happen to the case if they could not agree "on a count on a defendant." [R.2969, 11.8-9, vol. 24]. Over an objection that the Trial Judge's answer would coerce the jury into compromising [R.2971, 11.16-21, vol.24], the Judge decided to send the following reply to the jury.

> Ladies and gentlemen of the jury:
> Please be advised that a verdict can be received as to any individual on any count in which all jurors have agreed.
> If there is not a unanimous agreement on any count as to any individual, please advise the Court if further deliberations will assist you in reaching a verdict. [R.2970, 11.24-25, R.2971, 11.1-4, vol. 24].

The Trial Court immediately thereafter recessed for lunch until 1:30 [R.2972, 11.23-24, vol.24]. It appears from the record, as cited above, that the jury was not given the note until after returning from lunch. At 1:45 p.m. the Court purportedly received a verdict from the jury foreperson, polled the jury, and entered the verdict of conviction of the Petitioners on all charges submitted to the jury.[R.2973-2984, vol.24].

Petitioner Ricki Garza was sentenced to life plus 95 years incarceration and a $2,001,000.00 fine with a three year special parole term under pre-guidelines sentencing law. Petitioner Juanita Garza was sentenced to 10 years incarceration and Petitioner Soza was sentenced to 20 years pre-guidelines sentencing law. Petitioner Juanita Garza was sentenced to 10 years incarceration and Petitioner Soza was sentenced to 20 years pre-guideline sentencing law.

Petitioner's motions for mistrial, judgment of acquittal and for new trial[1] were denied. Notice of appeal was timely given.

THREE JURORS STATED THAT NO UNANIMOUS VERDICT HAD EVER BEEN REACHED

Three of the jurors contacted the Trial Judge on their own [R.3005, 11.6-23, vol.24; R.3006, 11.11-13, vol.25], and thereafter filed affidavits complaining that no "unanimous verdict" had ever been reached by the jury during its deliberations. The jurors indicated that the foreperson had simply begun writing the word "guilty" on each of the verdict forms, even though the jury had not yet voted, and in spite of several jurors' protestations that they did not believe various Petitioners guilty of certain counts in the indictment.[R.3010, 11.24-25, R.3011, 11.1-7, vol.25; R.3013, 11.21-22, vol. 25; R.3016, 11.8-11, vol. 25].

The Trial Court made specific findings that each of these complaining jurors, when telephoned by the Judge, insisted that they "had never agreed to return a guilty verdict" as to certain counts. [Appendix B, *infra*, p. 32a] And the transcripts of the Trial Court's *ex parte* conversations with those jurors reflect they volunteered that the foreperson "had changed" the verdict form to "guilty" as to counts they had "all voted not guilty" [R.3010, 11.24-25, R.3011, 11.1-7, vol. 25; R.3016, 11.8-11, vol.25], and "wrote guilty" on other verdict forms, when the jurors had not voted at all [R.3013, 11.21-22, vol.25; R.3016, 11.8-11, vol.25]. Each of the complaining jurors recount essentially

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[1] Petitioners asked for a hearing on the validity of the verdict in their Motion for New Trial and in their reply to the Government's response to the Motion for New Trial. The Trial Court denied same.

the same scenario[2] that the jury foreperson simply picked up the jury paperwork, entered a verdict of guilty, despite their protests[3], and walked out of the jury deliberation

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2Whether it was during an "ex parte" telephone call from the court, by affidavit obtained by defense counsel, or under oath at in camera, ex parte proceedings in the Trial Court's chambers

3The Trial Court made specific express findings that:

"Ms. Reid stated that she ... *never agreed to return a guilty verdict on several counts*" [Appendix B, *infra*, at p.32a];

"Ms. Reyes ... insisted that *a vote was not taken on every count*" [Appendix B, *infra*, at p.34a].

Juror Gloria Ann Reyes states in her affidavit that:

"Wednesday's deliberations ended with the foreman's entering 3 counts of guilty on Ricardo Garza without a vote ever being taken. *I did not agree to this and told them so.*"

"On Thursday we came back and began arguing on Ricardo's counts... The foreman then said '...you know that Ricardo is guilty'. I said 'No, I don't know that Ricardo is guilty' ... I did not feel there was enough evidence to vote guilty on all counts so *I refused to vote Guilty or assent to a Guilty verdict.*"

"On Friday, I again stated I was not changing my mind about not voting guilty ... The foreman and the lady that works for GMAC then wrote guilty on the remaining counts on Ricardo Garza. *No vote was taken and that was never my verdict.*" [Appendix A, *infra*, at pp. 19a-20a].

Juror Thelma Reid states in her affidavit that:

"When the foreperson changed our verdict [as to Juanita Garza] *I objected .... I never withdrew my objection and still believe she is not guilty.*" [Appendix A, *infra*, at p.22a].

Juror Emma Aguilar, with whom the Trial Court did not speak, stated that: -

"The jury never unanimously voted to convict the Defendants on the counts they were convicted on....

room[4], thereby depriving them of any vote whatsoever.**

To dispel these allegations the Trial Court chose to interview and rely upon the very "jury foreperson" against whom the claims of misconduct had been lodged. [Appendix B, *infra*, p.33a] Petitioners submitted affidavits demonstrating that "the verdict delivered was not that actually agreed upon" and moved for a hearing on the matter. Despite such evidence of misconduct the Trial Court denied Petitioners' motion. [R.3064, 1.25, R.3065, 11.1-2, vol.27].

PROSECUTION OFFERED EVIDENCE OF CONDUCT FOR WHICH PETITIONER RICKI GARZA HAD BEEN PREVIOUSLY ACQUITTED

The government offered evidence it said rebutted a defensive theory that fingerprint evidence from the numerous items seized during the investigation would have exculpated Petitioner Ricki Garza, the Government offered evidence of charges for which he had been acquitted at the close of the Government's case-in-chief pursuant to Rule 29(a) of the Fed.R.Crim.P. [R.2695, 11.13-16, vol.21]

However, the evidence actually offered by the Government was to the effect that the fingerprints taken in connection with the charges for which Petitioner had been

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) Three of us jurors strongly disagreed with this procedure..." [Appendix A, *infra*, at p.16a].

4 As Juror Thelma Reid stated to the Trial Judge during his ex parte telephone interview:

> "So she [the foreperson] erased it [a not guilty verdict]. And without us voting again, she automatically just wrote guilty on it. And we tried -- *and before we knew it, she had the papers out the door and that was it...*" [R.3016, 11.8-11, vol.25]

acquitted, were not in fact Petitioner Ricki Garza's, but someone else's. [R.2706, 11.2-3, vol.21] Thus, rather than rebutting Petitioner's defensive theory, the evidence relating to the acquitted count supported same.

The Government specified and maintained that it was not offering the evidence as extraneous offense conduct under Federal Rule of Evidence 404(b). [R.2695, 11.13-16, vol.21; R.2797, 1.25, vol.21]. The Trial Court expressly ruled that it was not admitting the evidence as 404(b) evidence [R.2698, 11.5-7, vol.21], and criticized the prosecutor, outside the presence of the jury, for putting on the evidence at all [R.2730, 11.2-6, vol.21]. In closing the Government argued, over repeated objection, that the evidence proved Petitioner Ricki Garza was guilty of RICO, count 2 of the indictment. [R.2913-R.2915]

THE SUCCESSION OF CONTRADICTORY INSTRUCTIONS ONLY EXACERBATED AN ALREADY CONFUSED SITUATION

When the testimony regarding the acquitted count was admitted, the Trial Court refused to give any limiting instruction whatsoever. [R.2698, 11.16-20]. Then, when the Trial Court belatedly determined that a limiting instruction was appropriate, it proceeded to give a succession of contradictory and confusing instructions as to the purpose that such testimony was to be considered by the jury.

The jury was left to decide for itself whether to consider this testimony of the acquitted charge for all purposes [R.2698, 11.9-21], for substantive evidence as to all counts but one [R.2718, 11.15-19 & R.2719, 11.4-10, vol.21], as rebuttal evidence as to all counts [R.2778, 11.13-18, vol.22], or only to rebut evidence or theories offered by the defense [R.2778, 11.24-25 & R.2779,1.1, vol. 22], when in fact the evidence supported, rather than rebutted same. Then the jury was told to do all of the above [R. 2731,

11.22-25, vol.21].

Exacerbating this already hopelessly confusing situation, the prosecutor, over repeated objection, argued to the jury in closing that the jury should consider the evidence of the acquitted count substantively for the very purpose the Trial Court had previously forbade [R.2913-R.2915]. The jury could not help but use the evidence as substantive proof that the Petitioner Ricki Garza was guilty of count two of the indictment. That is precisely what the court permitted the prosecutor to argue, over repeated objection.

REASONS FOR GRANTING THE PETITION

Accidental, Mistaken Verdict Can Be Remedied; Intentional Deprivation Of Unanimous Verdict Cannot

It should not be the law that there exists a remedy for "clerical errors" or mistakes which result in the denial of one's Constitutional right to a unanimous verdict in criminal cases[5], but no redress when same is occasioned by an

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[5]The Sixth Amendment to the United States Constitution is based on English common law *See* IV William Blackstone, *Blackstone's Commentaries*, 343 (1769), and the Virginia Bill of Rights drafted by George Mason (1776). In fact, James Madison relied heavily on the Virginia Bill of Rights when he authored the federal bill of rights in 1789, the first ten amendments to the United States Constitution. The federal bill of rights was ratified by the states in 1791.

Blackstone's Commentaries, reveal that at English common law a person charged with "public wrong" was entitled to a unanimous verdict achieved by the "suffrage of twelve" jurors:

> "...[T]he founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the prefatory accusation of twelve or more of his fellow subjects, the grand jury; *and that the truth*

intentional wrong. But that is what the Fifth Circuit Court of Appeals decided in this case. *See U.S. v. Ortiz*, 942 F.2d 903 (5th Cir. 1991)[Appendix A, *infra*, p.15a-26a].

Federal Rule of Evidence 606(b)provides in pertinent part:

> Upon a inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations ... *as influencing the juror to assent to or dissent from the verdict ... or concerning the juror's mental processes in connection therewith....* Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Fed. R. Evid. 606(b). [emphasis supplied]

Here the juror's affidavits were offered to show that, in

> *of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals* and neighbors, indifferently chosen, and superior to all suspicion." IV William Blackstone, *Blackstone's Commentaries*, 343 (1769).[emphasis supplied]

George Mason's, Virginia Bill of Rights, reflect the understanding that guilty verdicts in criminal cases may only be reached by unanimity:

> "In all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial *jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty*; nor can he be compelled to give evidence against himself." George Mason, Virginia Bill of Rights, art. VIII (1776). [emphasis supplied]

A unanimous verdict was thought to be intrinsic to trial by jury.

several instances, *no* "assent or dissent from the verdict" was allowed, not *what* may have *influenced* a juror or what any juror's *mental processes* were relating to her "assent or dissent". By intentional misdeed the foreperson of the jury eliminated three jurors from the deliberative process altogether. *See* footnote 3, *supra.*

In this case the Trial Court made specific and express findings that three jurors " *claim they never joined the majority's verdict*"[6], and *"that they never unanimously agreed on any verdict*"[7]. This is not a case where jurors retracted the verdict previously agreed upon because they had misgivings or second thoughts[8], this is a case where three jurors complain "*they never unanimously agreed on any verdict*"[9], and the Trial Court found so. *See* Appendix B, *infra*, p.36a.

THIS COURT SHOULD DECIDE THAT INQUIRY OF JURORS IS PERMITTED AS TO WHETHER VERDICT WAS REACHED AT ALL

It must be the law that where *no* verdict is agreed upon, jury testimony is admissible to show same. Anything less would shake public confidence in the integrity of trial by jury. The policy for Federal Rule of Evidence 606(b) is to allow jurors freedom to deliberate, to protect them from embarrassment or annoyance, and to lend to the stability and

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6Appendix B, *infra*, at p. 36a.

7Appendix B, *infra*, p.36a.

8*See, e.g., U.S. v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978)[juror had *voted* guilty with reservations, but had nonetheless *voted guilty*].

9Appendix B, *infra*, p.36a.

finality of verdicts. Where jurors approach the Trial Court, on their own, to report that *no verdict was reached at all* the rule does not apply and the policy concerns are not affected.

> Allowing [jurors] to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion." Fed. R. Evid. 606(b), Notes of Advisory Committee.
>
> The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during deliberations." Fed. R. Evid. 606(b), Notes of Conference Committee.

The rule is silent regarding whether inquiry designed to determine the accuracy of the verdict may be made of jurors.

Jurors do not *reach* verdicts in open court, they *return the verdict they have already agreed to* in deliberations. Polling is no substitute for deliberations.[10]

10*U.S. v. Smith*, 562 F.2d 619 (10th Cir. 1977); *Jones v. Estelle*, 538 F.2d 651 (5th Cir. 1976)[upon receiving and reading verdict aloud court asked whether there was any mistake and the foreman stated that both verdicts were unanimous, judge then read verdict again, juror said there was a mistake, judge sent foreman back to jury room to make sure verdict was unanimous]; *U.S. v. Edwards*, 469 F.2d 1362 (5th Cir. 1972); *U.S. v. Sexton*, 456 F.2d 961 (5th Cir. 1972)[a juror cannot be "required to vote publicly in open court rather than in the jury room"]; *U.S. v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970); *Cook v. U.S.*, 379 F.2d 966 (5th Cir. 1967); *Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224 (D.C.Cir. 1942); *Matthews v. U.S.*, 252 A.2d 505 (D.C. App. 1969); *State v. Austin*, 6 Wis. 205, 207 (Wis. 1857)[quoted in *U.S. v. McCoy, supra*].

> Under the present administration of justice in this country, it is impossible to over estimate the importance of preserving the trial by jury in all its purity and integrity. The life, liberty, reputation and property of

This is so because the polling itself may create a situation where the juror feels coerced to vote in the courtroom. *See U.S. v. Sexton*, 456 F.2d 961, 964 & 66 (5th Cir. 1972)["[i]t must be emphasized that in this case a juror, in effect, voted in the courtroom and not in the jury room and she voted under the compulsion of the Court"].

Without distinguishing or overruling its previous decision to the contrary, the Court of Appeals for the Fifth Circuit held, in this case, where no verdict was reached at all, a juror could not contradict her answer to the Trial Court's polling.[11] The Court below cited with approval, in this case, its previous holding that rule 606(b) does not preclude testimony by jurors "to show ... that no verdict was reached at all", even where "a jury returned a verdict that on its face convicted", and "after" the district court "polled the jury"[12] *U.S. v. Dotson*, 817 F.2d 1127, 1129-30 (5th Cir.

> our citizens are constantly committed to the decisions of a jury. Hence the necessity for the great vigilance and care which are exercised by courts of justice, to secure a free, voluntary, conscientious, and unanimous verdict. *U.S. v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970)[quoting *State v. Austin, supra*].

11 Here, rather than inquiring as to each count separately, the Clerk of the Court simply asked each juror in a single question whether that was the particular juror's verdict as to *all* counts.

> Deputy Clerk: Lita Ortiz, will you please stand. Is this your verdict as to the Defendant Ricardo Garza on Counts 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, 15, 21, 40, 43, 44, 46, 47, and 48?[R.2975, vol. 24].

12 In *Dotson* the court made clear that the fact the trial court there "polled the jury" by "receiv[ing] in response a nodding of twelve heads", at p.1129, did "not present a polling problem", at p.1130. And that despite the adequacy of the unanimous poll, juror testimony was admissible "to show the true verdict or that no verdict was reached at all", *U.S. v. Dotson*, 817 F.2d 1127, 1130 (5th Cir. 1987). *See also*

1987). To allow otherwise discounts jurors' reticence to respond freely and un-coerced in the courtroom. The Trial Court in this case noticed a juror's hesitation during polling but did not inquire further.[R.3011, vol.25][13]

In mandatory terms Federal Rule of Criminal procedure 31(a) provides that a verdict must be unanimous, not that it just temporarily appear to be so.

> The administration of justice should not only be chaste, but (like Caesar's wife) should not even be suspected." III William Blackstone, *Blackstone's Commentaries*, p. 383.

U.S. v. Carter, 772 F.2d 66, 67-8 (4th Cir. 1985)["asking for show of hands"]; *Government of the Virgin Islands v. Hercules*, 875 F.2d 414, 417 (3d Cir. 1989)["the *method* of polling the jury is ... within the discretion of the trial judge"]; *U.S. v. O'Bryant*, 775 F.2d 1528, 1535 (11th Cir. 1985)[asking each juror individually]; *U.S. v. Shepherd*, 576 F.2d 719, 722, n.1 (7th Cir. 1978); *U.S. v. Chereton*, 309 F.2d 197, 200 (6th Cir. 1962)[asking "so say you all" for collective response]; *U.S. v. Weiner*, 578 F.2d 757, 764(9th Cir. 1978)["please indicate by answering if the verdicts just read are your verdicts" each juror individually responded]; *and Green v. Zant*, 738 F.2d 1529 (11th Cir. 1984)[allowing the jurors to collectively respond to a single question].

13 The Court: Let me ask you something. I know you hesitated. I saw that. Juror Thelma Reid: Uh-huh.

The Court: But you still said that was your verdict thereafter.

Juror Thelma Reid: I did not know -- I was scared. I did not know what would happen if I would have said no.

And when I got home I was still very emotional. And I thought to myself, God, I wish I would have said no even though I didn't know ... what would have happened to me or anything, you know." [R. 3011, vol.25]

CONSTITUTIONAL RIGHT TO UNANIMOUS VERDICT OVERRIDES CONCERNS OF PROCEDURAL RULE

In any event the right to a unanimous jury verdict is a Constitutional one, and overrides any concerns with a statutory right such as is contained in Federal Rule of Evidence 606(b). The right to a unanimous verdict in federal criminal trials is ensured by the Sixth Amendment to and Article III, § 2, cl. 3 of the United States Constitution. Unanimity has long been the rule. *See Apodaca v. Oregon*, 406 U.S. 404, 32 L.Ed.2d 184 (1972)[a majority of this Court agreed that the Sixth Amendment requires a unanimous verdict in federal criminal trials].[14]

14Justices Blackmun, Powell, Douglas, Brennan, Marshall and Stewart recognized that jury unanimity is required in federal criminal trials, Justice Blackmun for policy reasons. The plurality opinion was reached by only three justices, J. White, J. Blackmun, and J.Rehnquist; holding that there is no right to a unanimous verdict in state criminal trials. J.Blackmun and J.Powell concurred; J.Douglas, J.Brennan, J.Marshall, and J.Stewart dissented. Justice Blackmun's concurring opinion appears *sub nom Johnson v. Louisiana*, 406 U.S. at 365, 32 L.Ed.2d at 161, Justice Powell's concurring opinion appears *sub nom Johnson v. Louisiana*, 406 U.S. at 356 & 369 *et seq.*, Justices Douglas, Brennan, Marshall and Stewart's dissenting opinion appears *sub nom Johnson v. Louisiana*, 406 U.S. at 380, 32 L.Ed.2d at 170; Justices Brennan and Marshall's dissenting opinion appears *sub nom Johnson v. Louisiana*, 406 U.S. at 395, 32 L.Ed.2d at 178; Justices Marshall and Brennan's dissenting opinion appears *sub nom Johnson v. Louisiana*, 406 U.S. at 399, 32 L.Ed.2d at 181; and Justices Stewart, Brennan and Marshall's dissenting opinion appears at 406 U.S. at 414, 32 L.Ed.2d at 193.

THE DECISION OF THE FIFTH CIRCUIT IS IN CONFLICT WITH OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

The Court of Appeals for the Fifth Circuit relied upon the very evidence that the rule and this Court prohibits, to decide that it need not reach the issue whether "no verdict was reached." *See* Appendix A, *infra*, at p. 24a-25a.

> ...Reyes and Aguilar impermissible seek to 'testify as to any matter or statement occurring during the course of the jury's deliberations...'. *See* Appendix A, *infra*, at p.24a.

See McDonald v. Pless, 35 S.Ct. 783, 784-785 (1914)[testimony of juror could not be used to impeach his verdict, but rule should not be inflexible one].

At the same time the Court of Appeals failed to consider the juror's statements that no verdict had been reached, clearly what Rule 606(b) allows and what Rule 31(a) of the Rules of Crim. P., the U.S. Constitution and good policy require.

> The matter disputed here concerns a comment the juror volunteered concerning the deliberation process. Her indication that the verdict announced was '[n]ot really' her verdict was her only pertinent response. *U.S. v. Smith*, 562 F.2d 619, 621 (10th Cir. 1977).

And a number of Federal Courts of Appeals and States Courts of last resort hold that a juror's testimony or affidavit may be considered when determining whether the verdict announced was that which was actually reached. *U.S. v. Smith*, 562 F.2d 619, 621 (10th Cir. 1977); *U.S. v. Stauffer*, 922 F.2d 508, 513 (9th Cir. 1990)[after jurors telephoned the court reporting an acquitted count not reflected on the face of the verdict, the court inquired of the other jurors and corrected same]; *McCullough v. Consolidated Rail Corp.*, 937 F.2d 1167, 1171 (6th Cir. 1991)[post verdict interview with jurors was to determine what they decided, not why];

Attridge v. Cencorp Division Technologies International, 836 F.2d 113, 116(2d Cir. 1987)[day after verdict was returned judge interviewed jurors to determine what they had intended their verdict to be and changed verdict originally returned]; *Young v. U.S.*, 163 F.2d 187 (10th Cir. 1947)[juror affidavit admissible to show verdict was not one reached in the jury room], *cert. denied*, 332 U.S. 770, 92 L.Ed.2d 335 *and* 334 U.S. 859, 92 L.Ed.2d 1779(1948); *Freid v. McGrath*, 135 F.2d 833, 834 (D.C. Cir. 1943); *Harmon Cable Communication v. Scope Television*, 468 N.W.2d 350, 369-70 (Neb. 1991)[identically worded state rule of evidence as Fed. R. Evid. 606(b)]; *Bianchi v. Nordby*, 409 N.W.2d 835 (Minn. 1987)[without discussing rule 606(b)]; *Kink v. Combes*, 135 N.W.2d 789 (Wis. 1965)[same]; *Southern Pacific Railroad Co. v. Mitchell*, 292 P.2d 827 (Vt. 1956)[same]; *Kennedy v. Stocker*, 70 A.2d 587 (Vt. 1950)[juror statements can evidence that, through mistake *or otherwise*, the verdict agreed upon has not been correctly expressed].

Some State Courts of last resort would permit juror testimony regarding other matters. *State v. Callender*, 297 N.W.2d 744, 746 (Minn. 1980)[to determine whether racial prejudice had "infected" the jury's verdict]; *People v. Collins*, 730 P.2d 293, 301 (Colo. 1986)[to determine whether there was jury misconduct in coercing a verdict out of one of the jurors even though the jury had been successfully polled].

THE DOUBLE JEOPARDY CLAUSE BARS GOVERNMENT FROM SECOND BITE AT THE APPLE

Here the Government presented evidence of a count for which Petitioner Ricki Garza had been acquitted and argued that same "is submitted to you [the jury] in order to show you that Ricardo Garza was indeed connected with this

Franco organization in January of 1986" [R.2914, 11.24-25, R.2915, 1.1, Vol.22]. By doing so the Government impermissible re-prosecuted Petitioner Garza for a predicate act under count 2 of the indictment, when he had been previously acquitted of that same conduct.[15] Moreover, the trial Court's instructions exacerbated rather than clarified the use for which the jury could put the evidence.[16]

This Court has held that double jeopardy bars subsequent prosecution for the same offense after acquittal. *Green v. U.S.*, 355 U.S. 184, 190, 2 L.Ed.2d 199, 206, 78 S.Ct. 221 (1957).

> "[T]he, Double Jeopardy Clause... is written in terms of potential risk of trial and conviction..." *Price v. Georgia*, 398 U.S. 323, 329, 26 L.Ed.2d 300, 305 (1970).
>
> "...the plea of auterfoits acquit, or a former acquittal is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more

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15 Count two of the indictment charged:

> That from ... January of 1984 ... Ricardo Garza... did unlawfully... and knowingly ... agree with ... Antonio Franco, unindicted co-conspirator[]... to commit an offense...[in] violation of 18, United State Code, Section 1962(c).

16 The jury was left to decide for itself whether to consider this testimony of the acquitted charge for all purposes [R. 2698, 11.9-21], for substantive evidence as to all counts but one [R.2718, 11.15-19 & R.2719, 11.4-10, vol.21], as rebuttal evidence as to all counts [R.2778, 11.13-18, vol. 22], or only to rebut evidence or theories offered by the defense[R. 2778, 11.24-25 & 2779, 1.1, vol.22], when in fact the evidence supported, rather than rebutted same. Then the jury was told to do all of the above. [R.2731, 11.22-25, vol.21].

> than once for the same offense." *Green v. U.S.*, 355 U.S. 184, 187, 2 L.Ed.2d 199, 204 (1957) (quoting *Blackstone's Commentaries*, p.335).

Likewise an acquittal is final even if not followed by a judgment, jeopardy ends, and the defendant may not be placed in jeopardy for that offense again. *Green v. U.S.*, 355 U.S. 184, 187, 2 L.Ed.2d 199, 204 (1957). *Cf., Kepner v. U.S.*, 24 S.Ct. 797 (1904) [government may not appeal an acquittal since the appeal would twice put him in jeopardy]; *and Ball v. U.S.*, 16 S.Ct. 1192, 1195 (1896) [the double jeopardy clause bars re-prosecution when a defendant is acquitted even if a final judgment has not been entered in the court]; *and Green v. U.S.*, 355 U.S. 184, 187, 2 L.Ed.2d 199, 204 (1957) [government may not appeal an acquittal even if it appears to be erroneous].

Moreover, the concept of "continuing jeopardy" has never been accepted by a majority of this Court and was soundly rejected by *Breed v. Jones*, 421 U.S. 519, 534, 44 L.Ed.2d 346, 358 (1975).

> ... Holmes' view has "never been adopted by a majority of this Court". *Breed v. Jones*, 421 U.S. 519, 534, 44 L.Ed.2d 346, 358 (1975) [*quoting U.S. v. Jenkins*, 420 U.S. 358, 369, 43 L.Ed.2d 250 (1975)].

> ... [T]he fact that the proceedings had not "run their full course" ... does not satisfactorily explain why respondent should be deprived of the constitutional protection ..." *Breed v. Jones*, 421 U.S. 519, 534, 44 L.Ed.2d 346, 358 (1975).

And the doctrine has never been applied in the event of an acquittal. *Green v. U.S.*, 355 U.S. 184, 189, 2 L.Ed. 199, 205 (1957).

Furthermore, the collateral estoppel doctrine of the double jeopardy clause "...protects a man who has been acquitted from having to run the gauntlet a second time." *Ashe v. Swenson*, 397 U.S. 436, 446, 25 L.Ed.2d 469, 477 (1970). *See also Green v. U.S.*, 355 U.S. 184, 191, 2 L.Ed. 199, 206 (1957).

Petitioner Ricki Garza should not twice be placed in jeopardy for the offense for which he was acquitted, regardless whether the government attempts to re-prosecute him later that day or the next. Here the government was permitted to do precisely what the Double Jeopardy Clause forbids; to muster evidence it had not been able to marshall during its case and, after having seen the defense, refine the way it presented its case. The prosecution should not be afforded a 'dry run'.

CONCLUSION

The judgment below cannot be the law. It denies one the right to an unanimous verdict in criminal cases even when the deprivation of same has been occasioned by purposeful jury misconduct, a result which the Court of Appeals and State Courts of last resort are in conflict. More importantly, the opinion is at issue with decisions of this Court and from the guarantee of the Fifth Amendment which absolutely bars re-prosecution for offenses for which one has been acquitted. The petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gerald H. Goldstein, a member of the Bar of this Court, hereby certify that on this 24th day of February, 1992, three copies of the Petition for Certiorari were served by first class mail, postage prepaid upon Assistant United States Attorneys Charles Lewis and Melissa Annis, for the Southern District of Texas, 1001 E. Elizabeth St., Room 105, Brownsville, Texas 78521 and Post Office Box 61129, Houston, Texas 77208-1129, Mervyn Hamberg, Attorney, Department of Justice, P.O. Box 899, Ben Franklin Station, Washington, D.C., 20044-0899, counsel for the respondent the United States of America herein, upon the Solicitor General, Department of Justice, Washington, D.C. 20530 and upon Mr. Charles Roberts, Counsel for Appellant below, Maria Rosario Ortiz, 123 Mills, Suite 306, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Maria Del Rosario ORTIZ,
Ricardo Garza, Juanita R. Garza,
and Ismael Soza,
Defendants-Appellants.

No. 89-6099
United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1991

Defendants were convicted in the United States District Court for the Southern District of Texas, Filemon B. Vela, J., of drug offenses and they appealed. The Court of Appeals, E. Grady Jolly J., held that: (1) evidence sustained conviction; (2) affidavits of three jurors stating that they had not agreed to the guilty verdicts were not admissible to impeach the verdict; and (3) court did not abuse its discretion in denying one defendant's motion for severance.

Affirmed.

1. **Drugs and Narcotics** 123(1)

Defendant's convictions on drug charges were supported by evidence that she maintained drug trafficking records, gave money to a drug-running pilot, was present at residence where large quantities of marijuana and sacks brimming with cash were kept, was seen counting large sums of money, gave money to drug runners, and relayed messages and instructions to other participants in the enterprise, using code words.

2. **Drugs and Narcotics 123(1)**

Defendant's drug convictions were supported by evidence that he oversaw marijuana drivers in the absence of the leader of the organization, that he sometimes paid expenses incurred during marijuana deliveries, that he accompanied a driver on one delivery, and that he gathered $20,000 from inside one of the organization's homes and purchased a truck which was used to deliver marijuana.

3. **Drugs and Narcotics 123(1)**

Defendant's convictions for drug offenses were supported by evidence that she leased one stash house, that she gave false information on her lease, that she directed one of the drug-running pilots to go to a place where marijuana was stashed, that she gave false information on her lease, that she directed one of the drug-running pilots to go to a place where marijuana was stashed, that she visited a home which served no purpose other than to assist the drug distribution network, and that she once left it with a briefcase full of money.

4. **Criminal Law 923(4)**

Fact that one juror honestly but inaccurately answered question about relatives in law enforcement, failing to disclose that he had a sister and a cousin who worked as secretaries in the United States Attorney's office, did not entitle defendants to a new trial.

5. **Criminal Law 957(1,2)**

Juror may not testify as to method or arguments of jury's deliberation, effect of any particular thing upon outcome of the deliberation, mindset or emotions of any juror during deliberations, or the juror's own mental process during deliberations.

Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

6. **Criminal Law 957(6)**

Jurors' affidavits which stated that foreman had not allowed them to discuss individual charges, had recorded guilty verdicts to which not all agreed, and had refused to allow questions to be sent to the judge concerning

deliberation procedures were inadmissible to attack the verdict.

Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

7. **Criminal Law 957(1)**

Rule allowing juror testimony to show that no verdict was reached is not so broad as to allow a juror to contradict four earlier statements made by the juror in open court which unequivocally expressed agreement with the verdict.

Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

8. **Criminal Law 857(2), 860**

Mere fact that one juror had driven by an airport which might have been that which was involved in marijuana importation, that another had driven by condominiums involved in the operation prior to trial, and that a third mentioned during the trial that she knew one person to be a drug dealer did not show that extraneous prejudicial information was brought before the jury.

9. **Criminal Law 622.3**

Defendant did not show error in denial of motion for separate trial, which was sought on grounds that her husband, a codefendant, would testify in her favor at a separate trial where she did not show that the testimony would be exculpatory with respect to one of the charges as to which he would testify, his agreement to testify was at times equivocal, and his affidavit in support of the motion as filed at the eleventh hour.

10. **Criminal Law 622.3**

Defendant seeking severance on the ground that she needed the testimony of a codefendant must demonstrate bona fide need for the testimony, substance of the expected testimony, its exculpatory nature and effect, and that the designated codefendant will in fact testify.

Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

11. **Criminal Law 369.2 (7)**

Even though court had dismissed charge that defendant possessed marijuana at one apartment, evidence

relating to that charge was properly admitted to rebut defendant's contention that he was not connected to marijuana enterprise because items from which fingerprints could have been taken were not checked for fingerprints.

Roel R. Trevino, Pharr, Tex. and Charles Louis Roberts, El Paso, Tex, for Ortiz and Soza.

Gerald H. Goldstein and Cynthia E. Hujar Orr, Goldstein, Goldstein & Hilley, San Antonio, Tex. for Ricardo Garza.

Chris Flood, Houston, Tex., for Juanita Garza.

Merv Hamburg, Atty., U.S. Dept. of Justice, Crim,Div.,Appellate Section, Washington, D.C., and Paula C. Offenhauser, Asst. U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Texas.

Before REAVLEY, POLITZ and JOLLY, Circuit Judges:

E. GRADY JOLLY, Circuit Judge:

Four defendants appeal their convictions for various offenses arising out of a far-flung conspiracy to import and distribute marijuana. Of their five assignments of error, the one about which they most stridently complain is that the district court refused to order a new trial in the face of juror affidavits indicating that not all of the verdicts were unanimous. For the reasons that follow, we affirm.

I

This case poses complex facts, nearly all of which pertain to the ambitious drug smuggling operation underlying this appeal. For clarity and brevity, we recount only some of them, namely those necessary to a resolution of the issues discussed below.

In the mid-1980's, the defendant Ricardo Garza ("R.Garza") entered into a marijuana importation and distribution partnership with one Antonio Franco. Like many such arrangements, theirs called for marijuana to be smuggled from Mexico into Texas and then delivered to northern cities, such as New York, Chicago, St. Louis, and Kansas City. What set this conspiracy apart was its size; to label it vast is to risk understatement. For instance, one of the enterprise's many clients--Roy Dean--purchased from it approximately a ton of marijuana every week. R. Garza himself once boasted that the enterprise handled about ten percent of all marijuana trade in the United States.

The contours of the enterprise were routine enough. In March 1985, R. Garza leased an airport in Hargill, Texas; shortly thereafter, he hired a cadre of free-lance pilots to fly empty planes to Mexico-- usually Guadalajara--and to fly marijuana-laden planes back to Hargill. The pilots would then fly their cargo from Hargill to a ranch called the "checkpoint," so named because it was near a border crossing area. Once the marijuana reached the checkpoint ranch, drivers would transport it north in trucks and other vehicles, all replete with secret compartments. The drivers rarely if ever proceeded to their drop-off sites uninterrupted; as a matter of course, they would stop at houses in Houston that the enterprise either owned or rented, where the marijuana would be removed, weighed, rewrapped and finally reloaded into the vehicles. The drivers would then resume their trip to their respective northern destinations.

Strictly speaking, however, smuggling was not R. Garza's only occupation. While engaged in the drug

enterprise, he also operated a barely-if-at-all profitable automobile sales agency--Airport Auto Sales-- in McAllen, Texas. Maria Del Rosario Ortiz, the secretary at R. Garza's auto agency was his girlfriend but not his wife, that privilege being reserved for Juanita Garza ("J. Garza").[1] As for J. Garza's profession, she too ran a "legitimate" business, purchasing in early 1987 a jewelry store--also in McAllen--with funds largely obtained from R. Garza.

The enterprise used four Houston houses, two of which are of special significance. The first residence, located at 734 Turney Drive, seems to have been the most frequented. There, many if not most of the drug proceeds were stored, drivers would often receive their delivery orders, vehicles were fitted with secret compartments, and customers would occasionally pick up their contraband. The second, located at 5623 Blackjack Lane, was leased in February 1987 by R. Garza and J. Garza. It was at this residence where the marijuana cargos were unpacked, weighed, and then repacked.

In March 1987, the enterprise signed on Robert Greathouse, a driver who later became a government informant. Greathouse was introduced to R. Garza and Ismael Soza--a driver himself--at the Turney residence. Early on, Greathouse was asked only to make trips between the Turney house and the checkpoint ranch, and then only as part of a convoy that included Soza. Later, however, he assumed more responsibility, eventually making runs from the Blackjack home to customers in the north.

Just before his first of these runs, Greathouse met R. Garza, Soza, and a number of other drivers at the Blackjack Lane house. Ortiz was also present; in fact, when the topic of Greathouse's expenses arose, R. Garza asked Ortiz to get $500 from the bedroom, which she readily did. On another

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1 Although married, R. Garza and J. Garza were separated throughout the events in question.

occasion, this one at the Turney Drive house, Greathouse saw Ortiz using a money counting machine to count a large amount of cash. According to Greathouse, many of the rooms in the residence were filled with sacks of marijuana; the kitchen, however, was stuffed with green plastic sacks that Greathouse was told contained money.

Greathouse further indicated that Soza played an instrumental role in the enterprise. He was the leader of the drivers and, as such, took charge whenever R. Garza was away. In fact, it was oftentimes Soza rather the R. Garza who gave Greathouse an itinerary and expense money.

As for J. Garza's involvement, Greathouse testified that in March 1987--shortly after purchasing the jewelry store--she appeared at the Turney Drive house carrying jewelry and offered to sell various items to Franco, R. Garza, and other organization members, including Greathouse. Also, Greathouse once saw J. Garza drive off from the Turney Drive house with a suitcase of money.

In early September 1987, law enforcement officers placed a wiretap on the telephones at the La Vista condominium in McAllen shared by R. Garza and Ortiz. When speaking over the phone about drug matters, R. Garza and Ortiz would always use code words; suppliers eager to send marijuana to the enterprise; for instance, would indicate that they wanted to send R. Garza a "family". Through this code, R. Garza arranged for myriad shipments of marijuana to be delivered to the checkpoint ranch. Many times, Ortiz relayed these orders along with other messages to members of the organization.

Later in September 1987, DEA agents searched the Hargill airport in the presence of R. Garza and several enterprise pilots. One such pilot, Robert McLean, was a government informant. Although the agents' search uncovered a bunker underneath the hangar floor that contained 2,611 pounds of marijuana, R. Garza was merely detained, not arrested.

After R. Garza was released, McLean indicated that he planned to leave town immediately and asked R. Garza for his back pay. Unaware that McLean was an informant, R. Garza agreed, made a telephone call, told McLean to go to J. Garza's house--located on Kiwi Street--and told him that she would give him his money. McLean did so, and upon arriving at J. Garza's Kiwi Street residence received from her a paper bag containing $16,200 in cash.

In November 1987 and early January 1988, law enforcement officers executed search warrants for several locations associated with R. Garza's and Franco's enterprise. At the residence on Turney Drive, agents seized, among other things, two trucks equipped with secret compartments, $10,500 in cash, a money counting machine, and several beepers. At J. Garza's Kiwi Street residence, agents found a warranty deed for five acres of land that had been sold to R. Garza, a remitter copy of a cashier's check for $1400 to Paul O'Connell (the man who had leased the airport to R. Garza), a copy of a Mexican cashier's check for $60,000, a key to a Cessna airplane, and $21,851 in cash.

At J. Garza's jewelry store, officers found a rolodex file with the Turney Drive address, a title to one of R. Garza's pickup trucks, the lease and electric bills for service at the Blackjack Lane house, a receipt for a money order used to pay for utility service at another house used by the drug enterprise, business cards identifying both Juanita and her husband as owners of the jewelry store, and accounts records showing that a number of enterprise participants were customers of the store. Other records at the store showed that it had $192,000 in available cash but disbursements of $405,000.

And at R. Garza's auto sales agency in McAllen, officers found records in Ortiz's office reflecting payouts of hundreds of thousands of dollars to drug enterprise members, including Soza.

II

A forty-eight count indictment filed on February 16, 1989, in the United States District Court for the Southern District of Texas charged R. Garza, J. Garza, Ortiz, Soza, and a fifth defendant, Jamie Garza, with violations of federal drug, racketeering, currency transaction reporting, and money laundering laws. The four appellants pleaded not guilty with respect to each charge.

R. Garza was convicted of operating a continuing criminal enterprise,, 21 U.S.C § 848; RICO conspiracy, 18 U.S.C. § 1962(d); a RICO substantive offense, 18 U.S.C. § 1962(c); possession with intent to distribute 239 kilograms of marijuana, 21 U.S.C. § 841(b)(1)(A) and 18 U.S.C. § 2; eight counts of possession with intent to distribute 1000 or more kilograms of marijuana, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; two counts of using the telephone to facilitate the commission of a felony, 21 U.S.C § 843(b); five counts of money laundering, 18 U.S.C. § 1956; and transporting 200 kilograms of marijuana aboard an aircraft from Mexico to the United States, 19 U.S.C § 1590 and 18 U.S.C. § 2. For these offenses, R. Garza was sentenced to life plus a ninety-five year term of imprisonment and was ordered to pay a $2,000,000 fine.

Ortiz was convicted of RICO conspiracy, 18 U.S.C. § 1962(d); conspiracy to possess with intent to distribute 1000 or more kilograms of marijuana, 21 U.S.C. §§ 841(a)(1), 846; and five counts of using the telephone to facilitate the commission of a felony, 21 U.S.C. § 843(b). She was sentenced to a total imprisonment term of ten years.

J. Garza was convicted of RICO conspiracy, 18 U.S.C. §1962(d); a RICO substantive offense, 18 U.S.C. § 1962(c); conspiracy to possess with the intent to distribute more than 1000 kilograms of marijuana, 21 U.S.C. §841(a)(1), 846; and three counts of money laundering, 18 U.S.C. §§ 2,1956. She was sentenced to ten years imprisonment.

Soza was convicted of RICO conspiracy, 18 U.S.C. § 1962(d); a RICO substantive offense, 18 U.S.C. § 1962(c); conspiracy to possess with the intent to distribute more than 1000 kilograms of marijuana, 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; two counts of possession with the intent to distribute marijuana, 21 U.S.C. § 841(a)(1); and using the telephone to facilitate the commission of a felony, 21 U.S.C. § 843(b). He was sentenced to twenty years imprisonment.

III

All told, five issues require our attention. We address them in turn.

A

First, Ortiz, Soza, and J. Garza challenge the sufficiency of the evidence supporting their convictions. In evaluating their challenges, we must review the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the jury verdict, and then determine whether a rational trier of fact could have found beyond a reasonable doubt the essential elements of the respective offense. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781,2789, 61 L.Ed.2d 560 (1979); *United States v. Beverly*, 921 F.2d 559, 561 (5th Cir.1991).

(1)

In forwarding her insufficiency argument, Ortiz does not deny having committed the acts which form the basis of her conviction. She insists, however, that she performed all such acts at R. Garza's request and completely unaware that he was a drug trafficking kingpin.

[1] This argument makes little impression on us. At risk of belaboring the obvious, we have indeed held that "in drug conspiracy cases, the government must prove beyond a reasonable doubt ... that the accused knew of the conspiracy ..." *United States v. Jackson*, 700 F.2d 181, 185(5th

Cir.1983). The evidence here, however, is more than adequate to undergird the jury's finding that Ortiz's involvement in the drug enterprise was a knowing one. The government introduced a litany of data on this point. Ortiz maintained drug trafficking records; she gave McLean, a drug-running pilot turned informer $10,000; she was present at the Blackjack Lane residence, home to large quantities of marijuana and sacks brimming with cash; she was seen counting large sums of money; upon Garza's instructions, she gave money to Greathouse to defray his expenses during his trip north to transport marijuana; and she relayed messages and instructions to other enterprise participants, using code words no less.

Naturally, Ortiz is not without an explanation for some of these data. For instance, on those occasions where witnesses saw her counting, delivering, or retrieving large sums of money, she asserts that she was simply playing the role of secretary to R. Garza. As for the messages she relayed to the other drug enterprise participants, she claims that she did not understand the code and, thus, never understood the messages. These explanations, however, blithely overlook the fact that we are bound at this juncture to "resolve all inferences and credibility assessments in favor of the jury verdict." *United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir.1991). To make matters worse, both have only a hollow ring of truth: Ortiz's secretarial duties at Airport Auto Sales did not demand that she keep accounts for and give money to wholly unrelated concerns; and according to proof adduced by the government, even Ortiz's *housekeeper* had cracked R. Garza's primitive code.

(2)

[2] Soza's sufficiency challenge--an equally facile argument that need not keep us long--is an assertion that he was nothing more than a friend and legitimate business associate of R. Garza. The testimony of Greathouse alone is

enough to support the converse inference: He indicated (1) that Soza oversaw the marijuana drivers in Garza's absence; (2) that Soza sometimes paid his expenses incurred during marijuana deliveries; (3) that Soza accompanied him on one such delivery; and (4) that Soza gathered $20,000 from inside the Turney Drive house and with it purchased a truck later used to deliver marijuana. Soza, in short, was not merely placed in "a climate of activity that reeks of something foul." *United States v. Jackson*, 700 F.2d 181, 185 (5th Cir.1983). He was a creator of that activity and its criminal smell.

(3)

J. Garza levels her sufficiency attack against three of her six convictions: RICO, RICO conspiracy, and conspiracy to possess marijuana with intent to distribute. With respect to the RICO offenses, she argues that the evidence was inadequate to establish either that she knew of a racketeering conspiracy or that she knowingly committed racketeering acts; at most, she insists, the record reveals that she was in the presence of and associated with others engaged in racketeering activity. She takes a slightly different tack with the marijuana conspiracy, insisting that the record is bereft not only of evidence that she knew of and intended to join the conspiracy but also of proof that she was present when the conspirators undertook their conspiratorial aims.

[3] Although this sufficiency challenge is more tenable than the others, ultimately it too is unpersuasive. J. Garza not only leased the Blackjack Lane stash house but also gave false information on her lease. In addition, she called one of R. Garza's pilots and told him to go to the "ranch", the place where R. Garza stashed marijuana. She visited the Turney Drive house, a residence which served no purpose but to assist the drug distribution network, and once left it with a

briefcase full of money. On another visit to that house, she sold expensive jewelry to members of the drug enterprise. Upon R. Garza's instructions, after agents discovered the Hargill airport she gave informant McLean a paper sack filled with $16,200. And a search of her Kiwi Street house revealed much in the way of incriminating evidence, such as the remitter copy of the cashier's check, the key to the Cessna airplane, and $21,851 in cash. Taken in the aggregate, these factors leave us convinced that a reasonable jury could have found the elements of the three offences beyond a reasonable doubt. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt...." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982)(en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

B

The defendants insist that they are entitled to a new trial because (1) a juror had failed to inform the court that both his cousin and his sister were employees of a United States Attorney's Office, (2) the verdicts of guilt delivered on some counts of the indictment had not actually been agreed upon, and (3) extraneous prejudicial information was brought to the attention of the jury during its deliberations.

(1)

[4] After jury deliberations had commenced, a secretary employed by the United States Attorney's Office in Brownsville, Texas, approached the prosecutor and informed him that, while attending closing arguments, she had recognized one of the jurors as Jorge de la Fuente, her cousin. She further advised the prosecutor that the sister of this same juror also held a clerical position for the United States Attorney's Office, albeit in a different city. Upon

learning of these facts, the district court allowed the jury to continue with its deliberations, notwithstanding the fact that de la Fuente, when asked during *voir dire* whether he had any relatives or close friends in law enforcement, had responded only that his brother served as a police sergeant in Corpus Christi.

Later, in the aftermath of the jury verdict, the trial court interviewed de la Fuente. He freely admitted that the secretary who had contacted the prosecutor was in point of fact his cousin but stated that he rarely spoke with her and that he had always believed she worked for the Customs Bureau in a position unrelated to law enforcement. When the court asked about his sister's occupation, de la Fuente volunteered that she, too, was a secretary, and that she was in the employ of the United States District Attorney's Office in Houston. When asked, however, whether he had an inkling of the purpose served by such offices, de la Fuente responded: "I don't know what they do or what their job is or anything like that." Furthermore, he professed that he and his sister had never discussed her occupation, that he had not considered her in any way related to the prosecution, and that neither her nor his cousin's vocation bore upon his impartiality during deliberations.

In *McDonough Power Equipment Co. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1985), the Supreme Court established a two-pronged test that governs this very situation. In the words of the Court, "to obtain a new trial... a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equipment Co.*, 464 U.S. at 556, 104 S.Ct. at 850. We think it clear that the appellants have not so demonstrated. For starters, de la Fuente's familial ties to employees of law enforcement agencies may well not support a challenge for cause. *See Brogdon v. Butler*, 838 F.2d 776,778 n.1 (5th

Cir.1988); *Sudds v. Maggio*, 696 F.2d 415, 416-417 (5th Cir.1983). Moreover--and much more important--de la Fuente's post-verdict dialogue with the district court suggests that he answered the voir dire query honestly yet inaccurately, something *McDonough Power Equipment Co.* expressly permits. *Id.* 464 U.S. at 555, 104 S.Ct. at 849-50 ("To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give.... The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial").

(2)

After the jury returned its verdict on July 28, 1989, the court polled each juror four times, once for each defendant; each time, each juror affirmed that the verdict was his. Nevertheless, three days later, juror Thelma Reid phoned the district court's staff to express her concern about "improprieties" that had taken place during the jury's deliberations. Having secured the services of a court reporter, the court returned Reid's call, whereupon Reid claimed, among other things, that on several counts she had never agreed to return a guilty verdict. She stated that two other jurors, Gloria Reyes and Emma Aguilar, shared her concerns and would soon be in contact with the court. Rather than await these calls, however, the court seized the initiative and called Reyes, who echoed Ried's complaint that the verdict rendered in open court was not her own.

Following its talk with Reyes, the court informed the attorneys of the jurors' misgivings and gave the appellants leave to speak with the jurors outside of its presence. Armed with the court's blessing , the appellants soon acquired affidavits from Reid, Reyes, and Aguilar uniformly averring

that many guilty verdicts were simply the unilateral handiwork of the foreperson , Inocencia Gomez,[2] These

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2 The text of the three-with emphasis and errors as in the originals-follows ;

STATE OF TEXAS

AFFIDAVIT

COUNTY OF WILLACY

BEFORE ME, the undersigned authority , on this day personally appeared Emma Aguilar, who after being duly sworn by me upon her oath deposed and said:

"My name is Emma Aguilar, I reside at 888 North Bonham, San Benito, Texas. I was a juror in cause number 8-89-68, the United States of America v. Ricardo Garza, Ismael Sosa, Maria Del Rosario Ortiz and Juanita R. Garza.

"I would like to bring to light some events that occurred during the trial and jury deliberations that I believe are inconsistent with the instructions given to the jury by the court. Also, I feel the Court should know that I was not being truthful when asked if the verdict reflected my findings. "The final verdict was not my verdict. The jury never unanimously voted to convict the Defendants on the counts they were convicted on.

"Also the jury was given clear and specific instructions not to discuss the case in any way whatsoever at any time at all , prior to jury deliberations. However, I would like to point out that these instructions were disregarded by a juror on the first day of the trial on our way to lunch. She mentioned that she believed all the people on trial were guilty.

"Second, the jury was given instructions to consider the evidence on each count presented against each defendant. This procedure was not followed during the jury's deliberation. I was told that they were all guilty from the outset, and the foreperson stated we were to consider the case as a whole and not to vote on the individual counts as presented in court. Three of us jurors strongly disagreed with this procedure of voting and asked the jury foreman on various and numerous

occasions to seek clarification of this procedure so we could proceed as previously instructed. She refused to send a question to the Judge about the voting procedure. Since we were denied access to Judge F. Vela we were compelled to follow the foreman's procedures.

"At one point, in Mr. Ricardo Garza's case,we got to vote only on four counts, but later the decision was disregarded and the votes erased. When we first voted on Ismael Soza we found him Not Guilty on all counts and then later without any additional vote the foreperson changed it to guilty. Also, when we first voted on Juanita R. Garza we voted unanimously to acquit her of all counts except for one. When we were going back through Friday morning, I was told that if we found her guilty of any of them we had to find her guilty of all of the racketeering and conspiracy counts. No vote was ever taken to change our verdict on those counts but the foreperson changed the Not Guilty findings to Guilty without our consent. I never voted guilty to more than one count against Juanita R. Garza. Also, when we first vote on Rosie Ortiz we voted Not Guilty on all of the counts except one . Those Not Guilty findings were also erased and changed by the foreperson or the blond women who sat on the front row.

"Finally, *the verdict that was read in court was never my verdict, and I never voted in accordance with that verdict.* When I was asked by the Judge if it was my verdict I only answered yes because the others had and because I was afraid of what the court might do to me if I didn't. I don't think the Defendants got a fair trial and I hope that by informing the Court of this misconduct it will help to serve justice.

/Emma Aguilar/
EMMA AGUILAR

* * * * * *

STATE OF TEXAS

AFFIDAVIT

COUNTY OF WILLACY

BEFORE ME, the undersigned authority, on this day personally appeared Gloria Ann Reyes, who,after being duly sworn by me upon her oath deposed and said:

" My name is Gloria Ann Reyes. I reside at Route 2, Box 170, Raymondville, Texas. I was a juror in the case of the United States of America vs. Ricardo Garza, et al, Cause No. B-89-68, before the Honorable Judge Filemon Vela.

"I am giving this affidavit of my own free will, I am of sound mind and am not under any threat or duress.

"I wish to state that the Defendants in this case were denied a trial and verdict by a unanimous jury.

"At no time during the deliberations did the jury unanimously vote to convict Ricardo Garza, Juanita R. Garza, Marie del Rosario Ortiz or Ismael Soza and at no time during the deliberations did I vote for a guilty verdict as to Ricardo Garza or any of the other defendants in this case nor did I assent to such a verdict. In fact, at no time during the deliberations was there a vote taken on the guilt or innocence of Ricardo Garza.

"At the time we were polled by the court I lied about that being my true verdict because I was intimidated by the courtroom atmosphere, and power of the Government and fear of being ridiculed by the Judge. "During the trial and deliberations there were certain other matters that I feel should be brought to the attention of the Court that I feel are inconsistent with my understanding of the term "Trial by Jury."

"On the third day of trial on our way to lunch, even though the jury had been given clear and specific instructions not to discuss the case in any way nor make independent investigations, one of the jurors stated that she knew one of

the individuals mentioned during the trial, Otto Chacon, and that she knew he was a drug dealer and that the people on trial were guilty. Another juror commented that she had driven by "La Vista Apartments" during the course of the trial and they appeared to be very expensive condominiums not cheap apartments and where was the money coming from to pay for these very expensive condos.

"On the first day of deliberations, as soon as we were in the jury room the jury foreman took the verdict forms. Starting on Ricardo Garza's form she read the first count and stated "guilty" right everyone?, without discussing the facts or the evidence. She proceeded to do the same on the next 2 counts until I said "No, wait a minute that is not what the Judge instructed, I understood we are supposed to weigh the evidence and vote on each count and each defendant." "I was then told by juror Jorge De La Fuente that I was narrow-minded and that I was supposed to look at the whole case as an umbrella. I then asked "do you mean everyone is guilty" and the foreman said "Yes".

"Wednesday's deliberations ended with the foreman's entering 3 counts of guilty on Ricardo Garza without a vote ever being taken. I did not agree to this and told them so.

"On Thursday, we came back and began arguing on Ricardo's counts. The foreman then said "lets put Ricardo aside" and went on to Ismael Soza. The foreman stated that Ismael Soza was never caught with any marijuana and I said he was not even at the airport. I then asked her to ask the Judge if each count and each defendant was to be taken individually and she refused. I wanted it clear as to whether we should consider each count

and each defendant separately. The foreman then said "we will go by each count but you know that Ricardo is guilty." I said "No, I don't know that Ricardo is guilty." I want to consider each count and I want to read it." I did not feel there was enough evidence to vote guilty on all counts so I refused to vote Guilty or assent to a Guilty verdict.

"Ismael Soza was then set aside and the foreman entered a guilty verdict on all counts even though a vote was never taken. "After discussions on Juanita we unanimously voted "not guilty" with the except of one count.

"On Friday, I again stated I was not changing my mind about not voting guilty without taking each count individually and for each defendant. I also requested clarification on the term "racketeering." We were told to read our instructions. Jorge De La Fuente then read the instructions and told me to look at the case like an umbrella. The foreman said that the women would get probation, but that we were forced to find them guilty of racketeering since they were guilty of other things.

"The blond woman then took the forms from the foremen and told her she had done them wrong and changed the not guilty findings to guilty.

"The foreman and the lady that works for GMAC then wrote guilty on the remaining counts on Ricardo Garza. No vote was taken and that was never my verdict.

"When we were polled I stated it was my true verdict but only because I felt intimidated and that I might be subject to legal proceedings and ridiculed by the Judge.

"I have made this statement because I realize that in this case justice was not served because of blatant manipulation of jury deliberation procedures.

/Gloria Ann Reyes/
GLORIA ANN REYES

* * * * * *

STATE OF TEXAS

AFFIDAVIT

COUNTY OF CAMERON

BEFORE ME, the undersigned authority, on this day personally appeared Thelma Reid, who, after being duly sworn by me upon her oath deposed and said:

"My name is Thelma Reid. I currently reside at 127 Highland Drive, Brownsville, Texas. I recently participated as a juror in Cause No. B-89-68, United States of America v. Ricardo Garza, Ismael Soza, Maria del Rosario Ortiz and Juanita R. Garza.

"I am making this statement of my own free will for the sole purpose of informing all parties of events that occurred during the trial which I believe were improper.

"The verdict read in court is not my verdict. The jury never unanimously voted to convict Ricardo Garza, Ismael Soza, Maria del Rosario Ortiz and Juanita R. Garza as the verdict read in court indicated.

"Also, during the trial the court repeatedly instructed the jury to consider only the evidence presented on *each* count as applied to *each* defendant. However, in our deliberations we failed to follow this instruction.

We never voted on each count and never voted on each defendant in each count. Three of us strongly disagreed with the voting procedures that were being used and one juror repeatedly asked the foreperson to send a question to the Judge for clarification on his instruction regarding voting. However, the foreperson refused to send the question to the Court. There were some counts that the foreperson wrote in the word "guilty" to reflect our findings when we had actually never voted on

that count. "on one occasion we voted unanimously to acquit the defendant Juanita Garza of all racketeering counts and conspiracy counts. Afterwards a question was sent to the court requesting the definition for racketeering and the elements necessary to find a defendant guilty or racketeering. The court's answer was read to us by the foreperson. No other vote was ever taken as to Juanita Garza on those counts but the foreperson erased our finding of "not guilty" and changed it to 'guilty.' If there had been a subsequent vote and if there were now a vote, I would vote 'not guilty' on those counts. When the foreperson changed our verdict I objected but was told not to worry because Janie would get probation anyway. I never withdrew my objection and still believe she is not guilty.

"Similar incidents occurred when voting on allegations against Maria del Rosario Ortiz and Ismael Soza. Also, when we were voting on the charges against Ricardo Garza we only voted on four counts and did not vote on all counts that the verdict reflected a guilty finding on.

"Finally, and most importantly, when the verdict was read in court, it did not reflect my verdict and I never intended what was read in court as ever being my verdict. When asked by the court, I hesitantly shook my head yes but that was only out of fright and intimidation. I was afraid that I might be subject to some legal penalty if I was to tell the court the truth.

"I make this statement now because I truly believe that I have not upheld my oath as a juror. When I was first sworn I promised that a true verdict I would render based upon the law and evidence in this case. By not telling

affidavits, in turn, were incorporated into the appellants' respective motions for a new trial, filed in August of 1989.

Upon reviewing the affidavits, the district court conducted some investigation of its own. First, on September 19, 1989, it interviewed Gomez. Her account of the deliberative process stood in flat contradiction with the affiants'. According to her, a vote using written ballots was taken on each count as to each defendant; and before the word "guilty" was written on the verdict form, she received a ballot from each juror on which the word "guilty" had been written. Later, the court interviewed Reyes, who continued to insist that some guilty verdicts were rendered without a vote, much less unanimity. Lastly, the court called a juror chosen at random---Lita Ortiz--who sided with Gomez by indicating that the jurors had individually voted on each defendant and each count.

[5] Its inquiry finished, the trial court on September 27, 1989, entered an order rejecting the appellants' challenge to the verdict and denying their respective pleas for a new trial. The order succinctly expressed why: "The majority of the ... conversations with jurors and the affidavits of jurors fall squarely within the ambit of Federal Rule of Evidence 606(b)," which "under the facts of this case ... bars any inquiry into the unanimity of the jury's verdict."

We concur. Federal Rule of Evidence 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, *a juror may not testify as to*

> the court that the verdict that was read was not my verdict, I have violated my oath."
>
> /Thelma Reid/
> THELMA REID

* * * * * *

> *any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith*, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention of whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

(Emphasis added.) We note that the rule separately bars juror testimony regarding at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations.

[6] The Rule proscribes the post-trial testimony on which the defendants' motions rest. In their attempt to retract their earlier verdicts personally delivered in open court, Reyes and Aguilar impermissibly seek to "testify as to any matter or statement occurring during the course of the jury's deliberations..." Indeed, the Advisory Committee notes accompanying 606(b) single out voting as such a "component of deliberation."

The defendants seek to squeeze the instant case into two putative Rule 606(b) exceptions. We have allowed post-trial juror testimony when the evidence was of a clerical error in the verdict, *see United States v. Dotson*, 817 F.2d 1127 (5th Cir. 1987), or that no verdict was reached, *see Fox*

v. United States, 417 F.2d 84 (5th Cir. 1969).

[7] In certain circumstances, the *Fox* exception may allow the court to consider jurors' statements to determine whether a verdict was in fact reached. The exception, however, is not so broad as to allow a juror to contradict four earlier statements made by that juror in open court, which unequivocally expressed agreement with the verdict. With respect to the remaining statements, they are expressly barred by the rule. These are statements concerning the testifying jurors' own states of mind, or the states of mind of other jurors, or the process of their deliberations.

(3)

Although the district court was correct to observe that a juror's testimony regarding deliberative matters usually falls squarely within the ambit of Rule 606(b), juror testimony concerning prejudicial extraneous information is a horse of another hue. The rule expressly provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention." Fed.R.Evid. 606(b). Not only that, we have previously held that when such materials find their way into the jury room, a defendant "is entitled to a new trial unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it." *Llewellyn v. Stynchcombe*, 609 F.2d 194, 195 (5th Cir. 1980).

The appellants cite three incidents that they contend implicate the rule in *Llewellyn*. First, one of the jurors--Reyes-- mentioned that she had driven by an airport in Hargill, that she had been unable to see over the fence surrounding the airport, and that she was therefore uncertain whether it was the airport R. Garza had leased. The other two incidents are described in Reyes's affidavit:

> On the third day of trial on our way to lunch, even though the jury had been given clear and specific instructions not to discuss the case in

> any way nor make independent investigations, one of the jurors stated that she knew one of the individuals mentioned during the trial, Otto Chacon, and that she knew he was a drug dealer and that the people on trial were guilty. Another juror commented that she had driven by "La Vista Apartments" during the course of the trial and they appeared to be very expensive condominiums not cheap apartments and where was the money coming from to pay for these very expensive condos.

[8] The district court rejected the appellants' argument that these three episodes warranted a new trial, concluding that there was no reasonable possibility that any of the extrinsic information prejudiced the defendants. We are to uphold the refusal to grant a new trial absent an abuse of discretion. *McDonough Power Equipment Co.*, 464 U.S. at 556, 104 S.Ct. at 850. Again, we find no such abuse. In coming to its holding, the court below made the following findings, all of which we deem perfectly proper. Reyes's drive-by of the Hargill airport was incidental--she had come upon the field fortuitously--she was not even sure that it was the correct airport, and she brought up her drive-by before deliberations began. As Reyes suggested in an *in camera* interview, the La Vista drive-by occurred prior to trial; thus, it, too did not constitute a juror investigation. Additionally, in that same *in camera* exchange, Reyes indicated that the juror who had seen the apartments mentioned only that the apartments looked quite expensive, nothing more. And there is no indication that the reference to Chacon was either brought up during or had an influence on deliberations. Furthermore, the prosecution's case-in-chief contained evidence of Chacon's relationship to the drug enterprise, thus giving the defense some opportunity to contradict the assertion that Chacon was a drug dealer and placing the instant case on footing different from *United States v.*

Howard, 506 F.2d 865 (5th Cir.1975).

C

[9,10] Less than a week before trial and on the eve of juror selection, J. Garza moved to sever her trial from R. Garza's on the ground that her husband would agree to testify on her behalf if tried separately. In a sealed affidavit prepared by R. Garza and attached to J. Garza's motion, he stated that he "would be willing to testify at [J.Garza's] subsequent trial" and, further that he "would be able to exculpate her...." Specifically, were the motion granted, R. Garza averred that he "would testify" that "a large amount" of the $260,000 involved in the laundering scheme charged in count forty-three was actually consigned to him in the form of precious stones. With respect to count forty-four--charging the Garzas with laundering approximately $2,568--he stated that "in the event my wife is severed from trial and I was to testify, I would in fact testify that the $2,568 was given to my wife by me and she had no knowledge of the origination of the funds." The district court denied the motion, a decision J. Garza now assigns as error. We review the failure to grant such a motion for abuse of discretion. *United States v. Bolts*, 558 F.2d 316,322(5th Cir.),*cert, denied*, 434 U.S. 930, 98 S.Ct. 417, 54 L.Ed.2d 290 (1977).

We dismiss this argument for two reasons. First, irrespective of whether the court below was within its rights to refuse the severance request, J. Garza has not shown the quantum of harm necessary for reversal. "In order to demonstrate abuse of discretion, the defendant bears a heavy burden of establishing *compelling prejudice*." *United States v. Salomon*, 609 F.2d 1172,1175 (5th Cir.1980) (emphasis added). *See also United States v. Mota*, 598 F.2d 995, 1000 (5th Cir.1979)("The test in this circuit for reviewing the denial of a severance is that the defendant must be unable to obtain a fair trial without a severance and must demonstrate compelling prejudice against which the trial court will be

unable to afford protection"). For all her attention to the issue of whether the district court was wrong to deny her a separate trial, J. Garza has all but ignored the question of whether that denial deprived her of a fair trial and effected compelling, incurable prejudice.

Second and more importantly, however, we are convinced that the district court did not abuse its discretion in denying J. Garza's request. A defendant seeking a severance on the ground that she needs the testimony of a co-defendant must demonstrate (1) a bona fide need for the testimony; (2) the substance of the expected testimony; (3) its exculpatory nature and effect; and (4) that the designated co-defendant will in fact testify. *United States v. Grapp*, 653 F.2d 189 (5th Cir.1981); *see* Fed.R.Crim.P. 14. The trial court, after citing these criteria, concluded that, although J. Garza had made a prima facie showing of need and substance, as well as of the exculpatory nature of the testimony with regard to count forty-four, she had failed to prove that R. Garza's testimony would be exculpatory with regard to count forty-three, this because he promised to account for only a "large amount" of the laundered proceeds, not the full amount. It also noted that J. Garza's agreement to testify was at places equivocal,[3] that the exculpatory value of the testimony was not high enough to overcome the need for judicial economy, that the affidavit was exculpatory as to only two of the seven charges lodged against her, and that the affidavit was filed at the eleventh hour. In the light of this confluence of findings, we unequivocally hold that there

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3 Although J. Garza did make one unequivocal promise--he indicated that he *would testify* that a large amount of [the $260,000 at issue in count forty-three was] in fact received by me in the form of precious stones and held by me on consignment"--he at times hedged, avowing only that he "*would be willing to testify* at (J. Garza's) subsequent trial" and that"*/i/n the event...I was to testify,* I would in fact testify that the $2,568 was given to my wife by me and she had no knowledge of the origination of the funds" (emphases added).

was no abuse of discretion.

D

[11] Count five of the indictment charged R. Garza with possessing marijuana on January 11, 1986, at the apartment of one Hector Palacious. At the close of the government's case-in-chief, the court dismissed this count on the ground that no evidence had been presented in support of the underlying charge. *See* Fed.R.Crim.P. 29(a). Subsequently, in the course of presenting his defense, R. Garza adduced testimony that evidence from the Hargill airstrip--a walkie-talkie, a radio, various papers--was not but could have been checked for fingerprints. This testimony, argued R. Garza, meant that the jury was entitled to believe that he had nothing at all to do with the evidence seized at Hargill.

To rebut this argument, the government introduced evidence--primarily a cellular telephone and scales--discovered during a search of Palacious's apartment that could have been used to support a conviction on the already-dismissed count five. R. Garza argues that district court erred in admitting this evidence over his objection, that it compounded its error by giving the jury confusing instructions regarding the use of the evidence, and finally, considering that he had already won a dismissal of count five, that the admission of this evidence contravened the constitutional proscription on double jeopardy under the Supreme Court's holding in *Grady v. Corbin*, __ US __,110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

We disagree. In the first place, R. Garza's reliance on *Grady* is misplaced. That case instructs that a subsequent prosecution is barred "if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 110 S.Ct. at 2087 (1990). Here, by contrast, there has been no subsequent prosecution and hence no breach of the *Grady* standard. *United States v. Devine*, 934 F.2d 1325, 2343-45

(5th Cir.1991).

R. Garza's remaining two complaints are equally skewed. The trial court's decision to admit the rebuttal evidence was a proper exercise of its broad discretion in matters of this kind. *See United States v. Dotson*, 799 F.2d 189, 194 (5th Cir.1986); *United States v. Renfro*, 620 F.2d 497, 502 (5th Cir.1980). Read as a whole, its instruction--which in relevant part admonished the jury to use the effects found at Palacious's apartment for rebuttal purposes only--were "comprehensive, balanced, fundamentally accurate...not likely to confuse or mislead" and hence adequate, *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 511 (5th Cir.1980). And in any event, given the overwhelming weight of the evidence against R. Garza, any evidentiary error associated with the admission of the rebuttal evidence was by all measures harmless. *Kotteakos v. United States* 328 U.S. 750, 764-765, 66 S.Ct. 1239, 1247-48, 90 L.Ed. 1557 (1946).[4]

E

Finally, Ortiz argues that the district court erred in denying her bail pending her appeal. Because we affirm Ortiz's convictions, however, this issue is moot. *See United States v. Williams*, 822 F.2d 512, 517 (5th Cir.1987).

IV

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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4 In a motion filed October 11, 1990, Ortiz adopted the sections of R. Garza's brief devoted to this issue. *See* Fed.R.App.P.28(i). This maneuver, while puzzling, is futile, for any error in the admission of the count five evidence is assuredly harmless as concerns Ortiz.

APPENDIX B

283

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
SEP 27 1989
Jesse E. Clark, Clerk
By Deputy/s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

CRIMINAL
NO. B-89-68

VS.
RICARDO GARZA
ISMAEL SOZA
MARIA DEL ROSARIO ORTIZ
JUANITA R. GARZA

MEMORANDUM AND ORDER

Before the Court is Defendants Ricardo Garza, Ismael Soza, Maria Del Rosario Ortiz, and Juanita R. Garza's Motions for Acquittal and for New Trial. Although these Motions are based on several theories, the Court feels it has already adequately addressed all of Defendants' contentions except one. The one remaining issue is whether the jury's verdict was invalid or tainted by any extraneous influence.

FACTS

On July 28, 1989, jurors returned a verdict finding all four Defendants guilty of several counts alleged in the indictment. The Court polled each juror individually to determine if it was their true verdict. Each juror stood up alone four times, once for each Defendant, and affirmed that

indeed it was their true verdict. As a result, the Court accepted the verdict and discharged the jury.

On July 31, 1989, juror Thelma Reid contacted the Court's staff claiming that she felt compelled to reveal certain improprieties that took place in the jury room. After obtaining a court reporter, the Court returned Ms. Reid's call. Ms. Reid stated that she had many misgivings about the verdict and that she had never agreed to return a guilty verdict on several counts. Ms. Reid did not indicate any outside pressure or extraneous influence. She also stated that two other jurors, Gloria Reyes and Emma Aguilar, had similar concerns and would be calling the Court later.

The Court then called Ms. Gloria Reyes. Again, the court reporter recorded the conversation. Ms. Reyes voiced similar concerns about her verdict stating that she had lied to the Court when polled. Like Ms. Reid, Ms. Reyes said that the verdict rendered in open court did not reflect her true verdict. The Court asked her if any outside pressure had affected her deliberations. She stated "No." The Court repeatedly asked her if there was anything else bothering her. At all times, she answered "No."

After talking with Ms. Reyes, the Court notified the attorneys that jurors had contacted the Court. In addition the Court allowed defense attorneys to talk to the jurors outside the Court's presence. Eventually, Defendants obtained affidavits from Gloria Reyes, Thelma Reid, and Emma Aguilar. Since the affidavits are of record, it is unnecessary for the Court to repeat the exact words of each affidavit; however, the Court found one specific portion of the affidavit of Gloria Reyes particularly troublesome. Specifically, Ms. Reyes states:

> On the third day of trial on our way to lunch, even though the jury had been given clear and specific instructions not to discuss the case in any way nor make independent investigations, one of the jurors stated that she knew one of

> the individuals mentioned during the trial, Otto Chacon, and that she knew he was a drug dealer and that the people on trial were guilty. Another juror commented that she had driven by "La Vista Apartments" during the course of the trial and they appeared to be very expensive condominiums not cheap apartments and where was the money comming [sic] from to pay for these very expensive condos.

Affidavit of Gloria Ann Reyes, Exhibit 1 to Ricardo Garza's Motion for New Trial or in the Alternative Motion for Acquittal, p.1. (Docket Entry #242) ("Reyes Affidavit").

Since Ms. Reyes' affidavit brought up the specter of extraneous influences, the Court felt it necessary to continue its investigations. On September 19, 1989, the Court interviewed jury foreperson Inocencia Gomez in chambers. The court reporter also recorded this conversation. Ms. Gomez stated that a vote using written ballots was taken on each count as to each Defendant. According to Ms. Gomez, before the word "guilty" was written on the verdict form, she received a ballot with the word "guilty" written on it from each individual juror. Although she vaguely recalled the name Otto Chacon, she could not remember the name coming up during deliberations or during lunch. She had no knowledge of any juror having driven by the La Vista Apartments and stated that this fact never came up in deliberations. She did mention that juror Gloria Reyes had driven by the Hargill Airport during trial, but Ms. Gomez recalled that Ms. Reyes said that she could see nothing due to a large fence. Finally, Ms. Gomez said that several of the jurors were emotionally upset over the task of deciding the guilt of the women involved and that she felt the misgivings of the jurors probably stemmed more from emotion rather than fact.

Later, on the afternoon of September 19, 1989, the

Court spoke with juror Gloria Reyes in chambers with the court reporter present. Ms. Reyes stated that the affidavit she signed was not in her exact words and that one of the defense attorneys had "polished" it up adding certain embellishments. Although Ms. Reyes acknowledged that a vote was taken on several counts, she insisted that a vote was not taken on every count. She responded that she understood what the Court was asking her when she was polled but claimed the "court atmosphere" intimidated her.

Ms. Reyes stated that she had driven by an airport near Hargill on the way to conduct some personal matters relating to her late husband's business. She claimed that she had not been able to see over a large fence surrounding the airport and that she was not even sure if it was the right airport. Ms. Reyes recalled another juror saying that that juror had driven by the La Vista Apartments; however, contrary to Ms. Reyes' affidavit, Ms. Reyes insisted that the juror had not driven by the apartment during trial. Instead, Ms. Reyes stated that the juror simply said that she had seen the apartments before and they looked expensive.

Ms. Reyes claimed that the reference to Otto Chacon came up when she and several other jurors went to Luby's for lunch on the second day of trial. Apparently, earlier that day, the prosecutor had introduced evidence mentioning a man named Otto Chacon. On the way to lunch, one of the jurors who worked for GMAC financing asked four of the other jurors "What do you all think?" The other jurors did not respond. The juror from GMAC then said that she thought that the Defendants were "guilty" because she had heard of Otto Chacon and that she knew he was involved with drugs. Ms. Reyes stated that although Otto Chacon's name may have been mentioned in the jury room, the jury never discussed the extraneous statement, nor did the statement play any role in the jury's deliberations.

After speaking with Ms. Reyes, the Court telephoned a juror at random who had not contacted the Court. This

juror was Lita Ortiz. Ms. Ortiz stated that the jurors had individually voted on each Defendant as to each count and that the jurors had not been coerced in any way.

Resolution of Motion

The vast majority of the Court's phone conversations with jurors and the affidavits of jurors fall squarely within the ambit of Federal Rule of Evidence 606(b). Rule 606(b) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the affect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter on which the juror would be excluded from testifying be received for these purposes.

FED. R. EVID. 606(b).

Defendants contend that Rule 606(b) does not apply because the verdict announced in open court was not the jury's true unanimous verdict. Defendants attempt to shoehorn the facts of this case into two narrow judicially created exceptions to Rule 606(b). *See United States v. Dotson*,817 F.2d 1127 (5th Cir.1987); *and Fox v. United States*, 417 F.2d 84 (5th Cir.1969). An analysis of *Dotson* and *Fox* establishes that neither of the exceptions created in these cases applies to the current facts.

In *United States v. Dotson*, the jury "... returned a verdict that, on its face, convicted Dotson of all ten of the counts in the indictment." *Dotson*, 817 F.2d at 1129.

> Later that evening, the trial judge received a telephone call from two of the jurors. The jurors stated that, contrary to the verdict read in court, the jury had unanimously voted to acquit Dotson on count ten of the indictment. The judge then telephoned the foreman of the jury, who confirmed that this was the case. Based on the foreman's affidavit, the district court, acting *ex parte*, corrected the verdict to acquit Dotson on count ten.

Id. at 1129. The Fifth Circuit affirmed the trial court's actions. *Id.* at 1130.

There is a crucial distinction between *Dotson* and the current case. Here, the jurors do not claim that the clerk accidently entered a "guilty" verdict when in fact they had unanimously voted for a "not guilty" verdict; instead, they argue that they never unanimously agreed on any verdict. Unlike *Dotson*, the jurors are not complaining of a clerical error. *See generally Robles v. Exxon Corp.*, 862 F.2d 1201, 1207-1208 (5th Cir. 1989), *cert. denied*, __ U.S. __, 109 S.Ct. 1967, 104 L.Ed.2d 434 (1989). (*Dotson*) limited to circumstances involving "clerical" errors). Rather, a few jurors are now claiming they never voted or joined the majority's verdict. This is precisely what Rule 606(b) sought to avoid. Like *Robles*, this Court confines the *Dotson* exception to facts involving clerical errors. Extending *Dotson* to encompass the current facts would allow the exception to consume the rule. Since the Court finds the current case involves no clerical error, *Dotson* is not applicable.

The defense also cites the case of *Fox v. United States* as authority for nullifying the jury's verdict. *Fox*, 417 F.2d 84. In *Fox* , the foreman of the jury announced the verdict

in open court. When the Court polled the jury, the clerk called each juror's name in rapid succession. One of the jurors, gave no audible response and simply gazed at the floor. The judge apparently did not notice the juror's nonresponsiveness so he discharged the jury and accepted the verdict. Four of the other jurors signed affidavits stating that the one juror who did not respond when polled never voted for the government. *Id.* at 88. Based on these facts, the Fifth Circuit remanded the case for a new trial. *Id.* at 89.

The facts in the current case are dramatically different from *Fox*. Here, each juror stood up alone four times and affirmatively stated that the guilty verdict was theirs. The jurors' later statements that they did not actually agree to the verdict are direct attempts to impeach their previous responses. As such, they are barred by Rule 606(b).

In *United States v. Weiner*, the jury returned a guilty verdict and the court polled each member of the panel. *United States v. Weiner*, 578 F.2d 757, 764 (9th Cir. 1978), *cert. denied*, 439 U.S. 981, 99 S.Ct. 568, 58 L.Ed.2d 651 (1978). During the poll, the judge asked each juror "please indicate by answering if the verdicts just read are your verdicts." *Id.* at 764. Each juror responded individually in the affirmative. The court then accepted the verdict and discharged the jury. Thirty minutes later, a juror went to the judge's chamber claiming that she had never voted "guilty." but rather had voted "guilty with reservations" during the jury's deliberations. Two other jurors made affidavits supporting this juror's statement. *Id.* at 764. When the defendants tried to argue the *Fox* exception, the court distinguished *Fox* stating:

> In [*Fox*], a juror remained silent when polled, and other jurors by affidavit said they thought a verdict by a majority was sufficient. The court held that there was no legal verdict. But here there was a verdict, and upon a poll of each juror in open court it was unanimous.

Id. at 764. Based on these facts, the Ninth Circuit refused to find that *Fox* was applicable and stated that if they adopted an expansive reading of *Fox*: "Opportunities for harassment of jurors and jury tampering would abound. Such a burden on the jury system could not long be tolerated." *Id.* at 764.

This Court adopts the view of the Ninth Circuit and rejects Defendants' argument that the exception articulated in *Fox* applies to the current situation. Instead, the Court holds that, under the facts of this case, Federal Rule of Evidence 606(b) bars any inquiry into the unanimity of the jury's verdict. FED. R. EVID. 606(b).

The Court's inquiry cannot end here however. The affidavits presented to the Court and the Court's conversations with the jurors indicate the existence of possible extraneous influences on the jury's deliberations. *See* Reyes Affidavit, p.1. Specifically, the Court must consider the references to Otto Chancon, the Hargill drive-by, and the La Vista drive-by. Since these are extraneous influences, they are outside the scope of Rule 606(b). FED. R. EVID. 606(b) ("...a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention ...").

Hargill Drive-By

Both jurors Reyes and Gomez mentioned that Gloria Reyes had driven by the Hargill airport during the trial. Since the Court held no hearing regarding this matter, the Court assumes that this is true. *See United States v. Chiantese*, 582 F.2d 974, 980 (5th Cir. 1978), *cert denied*, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979). Ms. Reyes stated, in her conversations with the Court, that she had simply passed an airport in the Hargill area. She was not certain if it was the right airport, nor could she see over a fence surrounding the airport. Her trip by the airport was not an intentional investigation; instead, she was simply driving to her late husband's business, which was located on the same road, to handle some personal matters (her husband

had died two months before trial), Ms. Gomez testified that Ms. Reyes had told her about the drive-by, but the drive-by had never come up during the jury's deliberations.

The Sixth Circuit has outlined the effect of an out of court investigation by a juror. *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982), *cert. denied*, 461 U.S. 929, 103 S.Ct. 2090, 77 L.Ed. 2d 300 (1983). *In re Beverly Hills* involved a juror conducting an electrical experiment in his own home than reporting the results to the jury. The Sixth Circuit felt this misconduct necessitated a new trial. They held that an investigation is improper where it "amounts to additional evidence supplementary to that introduced during the trial." *Id.* at 214.

In another case, *United States v. Posner*, a juror made an independent investigation of a property site during trial. *United States v. Posner*, 644 F.Supp. 885, 886, n.2 (S.D. Fla. 1986), *aff'd* 828 F.2d 773 (11th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1110, 99 L.Ed.2d 231 (1988). During *in camera* juror investigations, the trial court discovered that the juror had informed her fellow jurors of her visit and had relayed her impressions concerning the property's value and potential use. *Id.* at 886, n.2. The Florida district court felt this conduct necessitated a new trial. *Id.* at 886.

The current case is distinguishable from the *Posner* case in several ways. First, Ms. Reyes' drive-by was incidental and did not amount to an independent "investigation." Secondly, Ms. Reyes could not see over the fence surrounding the airport, was not sure it was the right airport, and did not bring up her drive-by during jury deliberations. Under these circumstances, Ms. Reyes did not supply any additional evidence supplementing that introduced during the trial. *See Beverly Hills*, 695 F.2d at 217. The Court finds that there is no reasonable possibility that the juror's drive-by significantly prejudiced the Defendants. *See United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975).

The La Vista Drive-By

Ms. Reyes' affidavit also stated that another juror mentioned driving by the La Vista Condominiums. Again, the Court will assume that this is true since the Court held no evidentiary hearing on this matter. *Chiantese*, 582 F.2d at 980. Although Ms. Reyes' affidavit reveals that this drive-by occurred during trial, Ms. Reyes stated during her *in camera* interview that, contrary to her affidavit, this drive-by occurred before trial. She added that her affidavit was not in her own words and contained several embellishments. According to Ms. Reyes conversations with the Court, the juror who drove by the La Vista Apartments simply stated that she had seen the condos before and that they were quite expensive. Ms. Gomez, the jury foreperson, said that she had no recollection of any mention of the La Vista Condominiums during deliberations and that she was unaware of any drive-by.

The Court finds that the La Vista drive-by occurred before trial. Under these circumstances, this Court feels that this drive-by does not constitute an independent investigation. In fact, it equates to nothing more than a general familiarity with the surrounding area. The Court cannot ask jurors to ignore every life experience tney have ever had when they walk into the door of the courthouse. The Court finds that there is not a reasonable possibility that the juror's drive-by was prejudicial to the Defendants. *See Howard*, 506 F.2d at 869.

Reference To Otto Chacon

Defendants argue that the jurors reference to Otto Chacon during lunch was prejudicial to the defense. In *United States v. Howard* the Court addressed a similar situation. *Howard*, 506 F.2d 865. In *Howard*, during deliberations, one of the jurors mentioned that she knew that the defendant had been in trouble before. The Court found a new trial was necessary because: "No such evidence was admitted during the trial and Howard obviously had no

opportunity to test, to contradict, or to qualify the juror's alleged assertion." *Id.* at 866. In remanding the case for new trial, the Fifth Circuit stated that "[The] danger to fair trials is most acute when facts which have not been tested by the trial process have been intentionally communicated directly to the jurors." *Id.* at 866.

The current case differs from *Howard* in several significant ways. First, there is no indication that the reference to Otto Chacon ever came up again in the jury room or played any role in the jury's deliberations. In fact, the evidence is to the contrary. The Court finds that the mention of Mr. Chacon was confined to one isolated statement made before deliberations began. Once rebuffed by other jurors silence, the juror apparently made no further references to Otto Chacon. *See United States v. Calbas*, 821 F.2d 887, 894-895 (2nd Cir. 1987), *cert. denied*, _ U.S. __, 108 S.Ct. 1114, 99 L.Ed.2d 275 (1988) (In finding that no new trial was needed, the Court took into account the fact that jurors "quickly rejected the introduction" of extraneous matters that arose during their deliberations).

Secondly, the prosecutor introduced evidence concerning Otto Chacon and his relationship to the alleged Garza-Franco drug enterprise during his case in chief. As a result, the defense had an opportunity to cross-examine the witness on this point. The concern voiced in *Howard* that the defense could not test this fact during the trial process is not present in the current case.

Thirdly, the prosecutors opened their entire file to the defense. Otto Chacon's name was available in this material. *See* Affidavit of Melissa Annis, p.1. All four attorneys for the defense had access to this file; yet during *voir dire* the defense did not request that the Court inquire into the *venire's* familiarity with Otto Chacon. In the *Howard* case, the defense could not realistically have inquired into the juror's knowledge of the defendant's past criminal history without unduly prejudicing the defendant. In the current

case, an extensive witness list was read to the jury panel during *voir dire*. Defendants could have easily added Otto Chacon's name to this list without prejudice to the Defendants. Surely the Defendants must shoulder a great deal of the burden of determining through *voir dire* who the jurors do and do not know.

This was a long trial and the evidence against the Defendants, especially Ricardo Garza, was overwhelming. The evidence concerning Otto Chacon was at most tangentially related to the case against the Defendants. The Court finds that the reference to Otto Chacon never affected the jury's deliberations in any way. Given the totality of the circumstances, there is not a reasonable possibility that the one isolated reference to Otto Chacon was so prejudicial that it necessitated a new trial. *See Howard* 506 F.2d at 869.

SUMMARY

Since the Court finds that none of the circumstances in the current case justifies a new trial, the Court DENIES Defendants' Motions for New Trial and for Acquittal.

DONE at Brownsville, Texas this 27th day of September, 1989.

/s/illegible
FILEMON B. VELA
United States District Judge

APPENDIX C

U.S. COURT OF APPEALS
FILED
NOV 25, 1991
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6099

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MARIA DEL ROSARIO ORTIZ,
RICARDO GARZA, JUANITA R. GARZA,
and ISMAEL SOSA,
Defendants-Appellants.

Appeal from the United States District
Court for the Southern District of Texas

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 13, 1991, 5 Cir., __, __F.2d__)
( )

Before REAVLEY, POLITZ and JOLLY, Circuit Judges.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
United States Circuit Judge

REHG-7

FILED
APR 21 1992
OFFICE OF THE CLERK

(2)

No. 91-1537

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICARDO GARZA, JUANITA R. GARZA,
AND ISMAEL SOSA,
Petitioners,
v.
UNITED STATES OF AMERICA
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

SUPPLEMENTAL BRIEF

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8

NO. 91-1537

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RICARDO GARZA, JUANITA R. GARZA, AND
ISMAEL SOSA,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

**On Petition For Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

SUPPLEMENTAL BRIEF

Now comes Petitioners and through the undersigned file this Supplemental Brief regarding the Petition for Writ of Certiorari pursuant to Supreme Court Rule 15.7 and present to this Honorable Court intervening matter which comprise compelling reasons for the Court to entertain the Petition for Writ of Certiorari which was filed out of time in this cause.

Counsel, Cynthia Hujar Orr, mistakenly relied on Rule 33.7 of this Court believing that same authorized the filing of typewritten copies of the Petition for Writ of Certiorari with prompt replacement by printed copies. This

is the first Petition for Writ of Certiorari that Mrs. Orr has assisted in preparing and filing with this Court and Mrs. Orr did not intend to circumvent this Honorable Court's rules.

Mrs. Orr first appeared before this Honorable Court on a Brief Amicus Curiae in *Cable News Network, Inc. and Turner Broadcasting System, Inc., v. Manuel Antonio Noriega and United States of America*, Cause No. 90-767 (1990) in which this Court allowed the filing of a typewritten brief with replacement by printed copies. She therefore believed that same was a procedure authorized by this Court's rule 33.7. However, Mrs. Orr now realizes that the brief amicus curiae she assisted with was an emergency appeal and understands that same must have therefore been given exceptional treatment.

The Rule upon which Mrs. Orr mistakenly relied states:

> The Clerk shall not accept for filing any document presented in a form not in compliance with this Rule, but shall return it indicating to the defaulting party any failure to comply. *The filing, however, shall not thereby be deemed untimely provided that new and proper copies are promptly substituted.* If the Court finds that the provisions of this Rule have not been adhered to, it may impose, in its discretion, appropriate sanctions including but not limited to dismissal of the action, imposition of costs, or disciplinary sanction upon counsel.

Supreme Court Rule 33.7 [emphasis supplied]. Mrs. Orr misinterpreted the above rule to permit the procedure she followed in filing the Petition for Writ of Certiorari with this Court.

On February 24, 1992[1], counsel filed a typewritten Petition for Writ of Certiorari[2]with this Court through the United States Postal Service and on the following day provided Alpha Law Brief Company same to be printed. Believing that she had timely filed the Petition for Writ of Certiorari with this Court, Mrs. Orr did not seek an extension of time for filing same. When the printed Petitions for Writ of Certiorari were received from Alpha Law Brief Company by counsel same were forwarded to this Court to replace the typewritten petitions. On April 2, 1992 Mrs. Orr called the United States Supreme Court Clerk to inquire regarding the status of the petition and was then informed of her error. The Clerk explained that the petition was not deemed filed until March 19, 1992 when the printed copies were received. *See* affidavit in Appendix of Cynthia Hujar Orr p. 1a, *infra*.

This Petition for Writ of Certiorari should be entertained for the compelling reason that counsel, who was assisting for the first time in the preparation of a Petition for Writ of Certiorari, was operating under a reasonable, but mistaken, belief that this Court's rules permitted the procedure she followed. More importantly, failure to review and reverse the decision below would endanger the fundamental constitutional right of those who are criminally accused to a unanimous jury verdict in federal court. *Cf. United States v. Mazurie*, 415 U.S. 947 (1974), 419 U.S. 544 (1975) [civil division of Department of Justice was mistaken about time within which Petition for Writ of Certiorari in a criminal case should be filed and the decision below endangered Indian rights]. This Honorable Court should waive the untimely filing of the Petition. *See,*

1The due date.

2The petition was accompanied by the certificate of service and appropriate docket fee.

Schacht v. United States, 398 U.S. 58, 63-64 (1970) [unanimous Court held untimely filing could be waived].

Respectfully submitted,

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**Counsel of record for Petitioners*

NO. 91-1537

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

RICARDO GARZA, JUANITA R. GARZA, AND
ISMAEL SOSA,
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v.
UNITED STATES OF AMERICA,
Respondent.

**On Petition For Writ of Certiorari to
the United States Court of Appeals
for the Fifth Circuit**

CERTIFICATE OF SERVICE

---

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I, Gerald H. Goldstein, a member of the Bar of this Court, hereby certify that on this _____ day of April, 1992, three copies of the Supplemental Brief were served by first class mail, postage prepaid upon Mervyn Hamberg, Attorney, Department of Justice, P. O. Box 899, Ben Franklin Station, Washington, D.C., 20044-0899, counsel for the respondent the United States of America herein, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530 and upon Mr. Charles Roberts, Counsel for Appellant below, Maria Rosario Ortiz, 123 Mills, Suite 306, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

_____

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APPENDIX

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF BEXAR §

BEFORE ME, the undersigned Notary Public, on this day personally appeared CYNTHIA HUJAR ORR, who, being by me duly sworn on oath deposed and stated:

"I am assisting counsel for the petitioners in this cause, no. 91-1537. I have read the above and foregoing Supplemental Brief, and every allegation of fact contained therein is true."

_____
CYNTHIA HUJAR ORR
Affiant

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(3)

No. 91-1537

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

RICARDO GARZA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly rejected a challenge to the verdict, where that challenge rested on post-verdict affidavits of three of the jurors.

2. Whether rebuttal evidence was admissible even though it also was pertinent to a count that had been dismissed for insufficient evidence at the close of the defense case.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-30a, is reported at 942 F.2d 903. The opinion of the district court, Pet. App. 31a-42a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1991. A petition for rehearing was denied on November 25, 1991. The petition for a writ of certiorari was filed on March 19, 1992, and therefore is out of time under Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, all three petitioners were convicted of participating in and conspiring to participate in the affairs of a drug enterprise through a pattern of racketeering activity (Counts 2 and 3), and conspiring to possess marijuana with the intent to distribute it (Count 4), in violation of 18 U.S.C. 1962(c) and (d), and 21 U.S.C. 846. Petitioner Ricardo Garza was also convicted of engaging in a continuing criminal enterprise (CCE) (Count 1), possession of marijuana with the intent to distribute it (Counts 6, 8-15), use of the telephone to facilitate drug trafficking activity (Counts 21 and 40), money laundering (Counts 42-44 and 47-48), and aviation smuggling (Count 46), in violation of 21 U.S.C. 848, 841(a)(1), and 843(b), 18 U.S.C. 1956, and 19 U.S.C. 1590. Petitioner Juanita Garza was also convicted of money laundering (Counts 42-44). And petitioner Ismael Sosa was also convicted of possession of marijuana with intent to distribute it (Counts 19 and 20) and use of the telephone to facilitate drug trafficking (Count 22).

Ricardo Garza was sentenced to imprisonment for life and fined $1,000,000 on Count 1. A concurrent $1,000,000 fine was assessed on Count 8. In addition, he was sentenced to concurrent terms of 20 years' imprisonment on Counts 2 and 3, 15 years' imprisonment on Counts 6 and 46, 10 years' imprisonment on Counts 8-15, 42-44, and 47-48, and 4 years' imprisonment on Count 40. Count 4 was dismissed in light of petitioner's CCE conviction. Petitioner Juanita Garza was sentenced to concurrent 10-year terms of imprisonment on each of the four counts on which she was convicted. Petitioner Sosa was sentenced to

concurrent 20-year terms of imprisonment on Counts 2, 3, 4, 19, and 20, and a 4-year concurrent term of imprisonment on Count 22.

1. In the mid-1980's, petitioner Ricardo Garza was one of the principals in a huge marijuana distribution network that ranged from Mexico to various American cities, including New York, Chicago, St. Louis, and Kansas City. In March 1985, Garza leased an airport in Hargill, Texas. Thereafter, he hired several pilots to fly planeloads of marijuana from Mexico, first to the Hargill airport and then from the airport to a ranch near the border. Other persons transported the marijuana from the ranch to northern cities. In the course of their travels, the drivers would stop at houses in Houston that the enterprise owned or rented. At those houses, the marijuana was removed from the trucks, weighed, rewrapped, and reloaded into the vehicles for transport to their ultimate destinations. Petitioner Ismael Sosa was one of Garza's truck drivers and played a supervisory role in the smuggling enterprise. Petitioner Juanita Garza, Ricardo Garza's wife, performed a variety of tasks in aid of the enterprise's affairs. In particular, she handled large amounts of cash for the enterprise on several occasions. Pet. App. 5a-8a; Gov't C.A. Br. 4-28, 33-34.

2. After a lengthy trial, the jury returned its verdict on July 28, 1989. The court polled the jury four times, once for each defendant. Each juror stated that he or she was in accord with the verdict. Pet. App. 15a, 31a-32a.

Three days later, juror Thelma Reid telephoned the trial judge's chambers and complained of certain incidents that allegedly had occurred during jury deliberations. With a court reporter present, the judge contacted Reid, who said that she had not agreed to

return a guilty verdict on several of the counts and that two other jurors, Gloria Reyes and Emma Aguilar, would soon contact the judge. Reid recounted some of the discussion that had occurred in the jury room, including her request to send notes to the judge regarding the counts in dispute. Reid stated that another juror had convinced her not to send the notes. Reid asserted that she hesitated during the polling, but announced that she agreed with the unanimous verdict because she became aware that other jurors who had dissented had changed their minds. She claimed that in open court she announced in favor of the verdict because she was afraid of what might have happened if she had dissented at that point. Pet. App. 15a; Gov't C.A. Br. 43-46.

The judge then telephoned juror Gloria Reyes. Reyes complained that the verdict announced in open court was not what she had desired. After speaking with Reyes, the judge spoke with the government and defense attorneys about his conversations with Reid and Reyes. Thereafter, defense lawyers furnished the judge with affidavits from jurors Reid, Reyes, and Emma Aguilar. Each of the affidavits alleged in essence that the verdict was the result of manipulation by the jury foreperson, Inocencia Gomez. The affidavits were incorporated in a motion for a new trial, filed in August 1989. Pet. App. 15a-22a; Gov't C.A. Br. 46-49.

The judge then interviewed jury foreperson Inocencia Gomez, who contradicted the claims of the three affiants. Gomez said that the jurors had used a written ballot for each count and each defendant; that she did not sign a verdict form until the jurors had voted unanimously; and that each defendant had been

given separate consideration. Gomez also described the voting procedure that she had used: the count under consideration was read, and each juror submitted a written ballot. Gomez recalled that she announced the votes after the ballots had been counted and that eventually the voting was unanimous except on one count. According to Gomez, after a recess, the dissenting juror stated that she would change her vote, making the voting on that count unanimous as well. Ballots were distributed and returned, and the unanimous decision was read aloud. Gov't C.A. Br. 49-50.

Later, the judge interviewed juror Reyes in person. While maintaining that the verdicts were not unanimous, Reyes' account of the deliberations was not entirely consistent with the allegations in her affidavit. Reyes said that she had prepared the affidavit but that a defense lawyer had "polished" it. Gov't C.A. Br. 50-51.

Finally, the judge selected another juror, Lita Ortiz, at random and telephoned her. Juror Ortiz agreed with Gomez that votes had been taken as to each defendant and each count; that the ballots were written; that the foreperson then announced the results of the balloting; and that the results of the voting were reflected by the published verdict. Pet. App. 23a; Gov't C.A. Br. 52.

3. On September 27, 1989, the district court issued an order denying the motion for a new trial Pet. App. 31a-42a. The court held that the verdict could not be impeached by the jurors' statements and affidavits, because the jurors' allegations fell squarely within the terms of Fed. R. Evid. 606(b), which prohibits jurors from impeaching their verdict by testifying or

submitting an affidavit about "any matter or statement occurring during the course of the jury's deliberations." Pet. App. 35a-38a; Gov't C.A. Br. 52-53.[1]

4. The court of appeals affirmed. Pet. App. 1a-30a. It agreed that the affiants were endeavoring for the most part to reveal matters that were precluded from consideration by Rule 606(b) and that no exception to the Rule was applicable in the circumstances of this case. Pet. App. 15a-25a.

ARGUMENT

1. Petitioners challenge the court of appeals' reliance on Fed. R. Evid. 606(b) to bar consideration of the affiants' claims that they did not agree on the verdict that was announced in open court. Petitioners claim that Rule 606(b) ought not to apply to situations where jurors approach the trial judge on their own to report that no verdict was reached. Pet. 8-12. Petitioners also maintain that the district court's refusal to consider the jurors' affidavits violated their constitutional right to a unanimous verdict, Pet. 14, and that the court of appeals' approval of the district court's action conflicts with the decisions of other courts. Pet. 15-16. None of those contentions is meritorious.

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[1] While declining to consider the "vast majority" of the allegations in the affidavits because they fell within the prohibitions of Rule 606(b), Pet. App. 35a, the court did address the few complaints advanced by the affiants regarding the introduction of extraneous information by some of the jurors. Accepting the truth of the claims that the isolated comments were made, the court determined that they were not prejudicial and thus did not warrant relief from the verdict. Gov't C.A. Br. 53-54, 61-63. Petitioners do not challenge that determination.

Petitioners essentially ignore the fact that the jury published a unanimous verdict and that the polling provided confirmation that the verdict announced was correct as to each defendant on each count. *United States* v. *Shepherd*, 576 F.2d 719, 724-725 (7th Cir.), cert. denied, 439 U.S. 852 (1978); Fed. R. Crim. P. 31(a) and (d). Petitioner's argument is simply an effort to impeach a verdict through post-verdict submissions of jurors alleging that they really did not intend to find the defendants guilty on some or all counts and explaining away their published pronouncements of guilt as the product of a subjective fear of condemnation from their peers. Rule 606(b), which restates the common law prohibition against impeachment of a verdict by a juror,[2] controls the disposition of that contention. *Tanner* v. *United States*, 483 U.S. 107, 121-127 (1987). See also, *e.g.*, *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915).

Petitioners' claim of a conflict among the circuits is unimpressive. Most of the cases they cite involve situations in which the jury reached one verdict but then announced a different one in court. In those circumstances, juror affidavits have been deemed to be adequate support for the judge to amend the verdict to reflect the one that the jury actually reached. See *McCullough* v. *Consolidated Rail Corp.*, 937 F.2d 1167 (6th Cir. 1991); *United States* v. *Stauffer*, 922 F.2d 508 (9th Cir. 1990); *Attridge* v. *Cencorp Division of Dover Technologies Int'l*, 836 F.2d 113 (2d Cir. 1987); *Freid* v. *McGrath*, 135 F.2d 833 (D.C. Cir. 1943).

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[2] The proposition that a jury cannot impeach its verdict traces its lineage to 1795, when Lord Mansfield refused to consider an affidavit from jurors admitting that they had reached their verdict by drawing lots. *Vaise* v. *Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1795).

Illustrative of this exception to Rule 606(b) is *United States* v. *Dotson*, 817 F.2d 1127, modified in part on other grounds, 821 F.2d 1034 (5th Cir. 1987). In *Dotson*, the jury voted to acquit on a particular count, but the verdict on that count was announced as a conviction. The judge corrected the verdict after conversations with the jurors confirmed that the announced verdict was wrong. The Fifth Circuit later explained *Dotson* as involving a narrow "clerical error" exception to Rule 606(b). *Robles* v. *Exxon Corp.*, 862 F.2d 1201, 1207-1208 & n.9 (5th Cir.), cert. denied, 490 U.S. 1051 (1989). In *United States* v. *Stauffer*, 922 F.2d 508, 513 (1990), the Ninth Circuit followed *Dotson* when it approved a district court's action in correcting a clerical error by changing the verdict on one count from guilty to not guilty and changing the verdict one another count from not guilty to guilty.

Of the federal cases cited by petitioners, only *United States* v. *Smith*, 562 F.2d 619 (10th Cir. 1977), and *Young* v. *United States*, 163 F.2d 187 (10th Cir.), cert. denied, 332 U.S. 770 (1947), deal with issues other than the use of jury affidavits or testimony to correct a mistaken transmission of the verdict from the jury. Pet. 15-16. *Young* involved an attempt to impeach the verdict through affidavits by jurors, which the court of appeals disallowed. And *Smith* involved a dispute over the response given by a juror during the polling; the court resolved that dispute by relying upon the stenographic record and refusing to allow testimony to rebut it. There is, therefore, no conflict among the circuits with respect to the application of Rule 606(b) to a verdict challenge such as the one in this case.

2. Count 5 charged petitioner Ricardo Garza with possessing marijuana on January 11, 1986, at the

apartment of Hector Palacios. At the close of the government's case-in-chief, the district court dismissed that count on the ground that no evidence had been adduced to support it. In his defense, Ricardo Garza established that government agents had not found his fingerprints on certain items seized at the Hargill airport. From that, Garza laid the basis for an argument that he had nothing to do with the evidence found at the airport. In its rebuttal case, the government introduced evidence of the discovery of a cellular telephone, scales, and plastic wrap, which had been found on January 11, 1986, during a search of Palacios's apartment, where Garza had been found sleeping. That evidence would have been admissible in the government's case-in-chief to help prove Count 5, but the jury never deliberated on that count, and the court instructed the jury that it could consider the Palacios apartment evidence only for rebuttal purposes. Pet. App. 29a-30a; Gov't C.A. Br. 69-70.

In the court of appeals, Garza claimed that the district court erred in admitting the rebuttal evidence because it tended to prove Count 5, on which he had already been acquitted. Garza also alleged that the court's instructions to the jury limiting its consideration of the rebuttal evidence were confusing. The court of appeals rejected Garza's claims, finding that the evidence was not barred by double jeopardy principles, that the court's instructions were not confusing, and that the introduction of the evidence, even if erroneous, was harmless. Pet. App. 29a-30a.

Contrary to petitioners' contention, Pet. 16-19, principles of double jeopardy and collateral estoppel do not bar the introduction of evidence that is relevant for some legitimate purpose simply because it might also tend to prove a count that has previously been dismissed. Neither double jeopardy nor collateral

estoppel bars the government from introducing any "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which [the defendant] has been acquitted." *Dowling* v. *United States*, 493 U.S. 342, 348 (1990).

Petitioner erroneously alleges that the rebuttal evidence allowed the government either to reprosecute him on Count 5 of the indictment or to serve as a predicate offense for the RICO conspiracy count. The jury, however, was never required to deliberate on Count 5. The RICO conspiracy count made no mention of Hector Palacios or any of the evidence seized at his apartment in connection with any predicate offense. In any event, the court instructed the jury that the evidence offered by the government of the "incident that happened in 1986" was not to be considered "for any of the so-called predicate offenses" involved in the continuing criminal enterprise or RICO counts. Tr. 2778.

Petitioner Garza also disputes the trial court's determination that the evidence in question was admissible as proper rebuttal. His argument is limited to a conclusory statement that the evidence supported, rather than rebutted, his defense theory. Pet. 17 n.16. The decision to admit the rebuttal evidence was a matter within the court's broad discretion. *United States* v. *Laboy*, 909 F.2d 581, 588 (1st Cir. 1990); *United States* v. *Levy*, 904 F.2d 1026, 1031 (6th Cir. 1990), cert. denied, 111 S. Ct. 974 (1991). Nothing in the record demonstrates that the court's ruling constituted an abuse of that discretion.

Finally, petitioner Garza assails the sufficiency of the instructions directing the jury to consider the evidence only for rebuttal purposes. Pet. 17 n.16; Gov't C.A. Br. 70. Petitioner does not indicate that he

sought a more elaborate instruction in a timely fashion. Moreover, the jury, which was not reluctant to communicate with the court during its deliberations, did not indicate any confusion regarding the manner in which it was to treat the rebuttal evidence.

In any event, the evidence complained of was only a small part of the government's case against Ricardo Garza. The proof of his association with and leadership of a vast marijuana trafficking enterprise was abundant. The proof included testimony from members of the enterprise and numerous items of corroboration. The government proved numerous predicates for the RICO violation. That being so, the court of appeals correctly concluded, Pet. App. 30a, that any error in the admission of the rebuttal evidence was harmless. See *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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